

## DOCTOR OF PHILOSOPHY

### Sentencing convicted thieves: Principals, policy and practice

Betts, Gary

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# Sentencing Convicted Thieves: Principles, Policy and Practice

G. Betts

A thesis submitted for the award of Doctor of Philosophy in  
Law

2011

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## **DECLARATION**

This thesis is all my own work and has not been submitted for an award at this, or any other university.

## **ABSTRACT**

The thesis examines court sentencing decisions in theft cases within the context of a proportionality-based sentencing framework. Whilst relatively little is known of the magistrates' court and Crown Court interpretations of proportionality, such as the impact that various aggravating and mitigating factors may have on the sentencing decision, the thesis examines those factors (relating to both the offence and the offender) that appear to have the greatest impact on the sentencing decision. Additionally, it was accepted here that the courts may rely (to some extent) on a number of other sentencing justifications, particularly crime prevention through rehabilitation, deterrence and incapacitation.

The thesis finds that only a small number of factors individually appear to affect the sentencing decision. In other cases, a number of factors work together to increase the seriousness of the offence and consequently inform the sentencing decision.

The thesis also finds that whilst proportionality considerations may dominate the sentencing decisions in some cases, in others the courts appear to have high regard to the need to prevent crime, particularly where an offender has a demonstrated pattern of offending due to a drug addiction. Whilst in some cases these crime reduction aims may be used within the confines of proportionality, the courts' desire to prevent crime may eclipse proportionality constraints, ultimately leading to an apparently disproportionate sentence.

## CHAPTER ONE

### INTRODUCTION

“The English Criminal trial, properly conducted, is one of the best products of our law, provided you walk out of court before the sentence is given.”<sup>1</sup>

#### 1.1 The Role of Sentencing

Sentencing has been described as “arguably the most important area of the law”.<sup>2</sup> It is the area in which the law inflicts upon the individual the greatest intrusion into his usual freedoms. It is the ultimate stage of the criminal process where justice can either be done or undone. Any perceived justice stemming from a conviction can be swiftly nullified by the imposition of an unjust sentence: a conviction in itself is of very little consequence unless followed by some form of punishment. But whether a sentence is just or not can only be determined if it is known *why* the sentence is justified.

#### 1.2 Justifications for Sentencing

A sentence may be justified on any number of crime reduction grounds. By sentencing an offender, it may be hoped that he (or others) may be dissuaded from committing further crime, either through deterrence, incapacitation or rehabilitation. On the other hand, a

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<sup>1</sup> Jackson (1940), at 184

<sup>2</sup> M. Bagaric (2001), at 3

justification for punishment may not rest on idealised notions of crime reduction at all. Rather than using punishment as a means to an end, it may be a means in itself. Each of these positions will briefly be considered below.

### 1.2.1 Deterrence

Deterrence seeks to control future conduct through fear of the consequences. In sentencing, the theory states that punishment is justified due to its crime preventive consequences, and the amount of punishment imposed should seek to deter the offender from committing further offences (special deterrence) and/or deter other potential offenders from entering a criminal lifestyle (general deterrence). Special deterrence would presumably escalate punishments for repeat offenders.<sup>3</sup> For each reconviction, it would be reasoned that the previous sentence had failed to deter the offender, so a more punitive measure would be tried. The gravity of the offence may not factor largely in the determination of sentence; the offender's perceived risk of reoffending would be a more central factor.

Under general deterrence, a person may be sentenced disproportionately severely in order to deter others from committing similar acts.<sup>4</sup> An objection to these exemplary sentences may be raised on the basis of the Kantian maxim that a person should be treated as an end and never as a means to an end.<sup>5</sup> An offender is only responsible for his own actions and not for the actions of others; the fact that he has committed an offence does not justify using him as a vehicle to deter others.<sup>6</sup> If others elect (or may elect) to offend, the original offender has

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<sup>3</sup> Ashworth (2010a), at 78

<sup>4</sup> Although it has claimed that punishment based on general deterrence is only ethically defensible if "the penalty is in reasonable proportion to the gravity of the offence..." Andanaes (1970), at 663. See also Tullock (1974), at 108.

<sup>5</sup> Kant (1991), at 140

<sup>6</sup> Even some deterrence proponents accept this objection as unavoidable. See for example, Ellis(2003), at 338

no control over this decision and so cannot be deemed responsible. If he is not responsible, he should not be punished for the crimes (or potential crimes) of others.

For deterrence to work in practice, it relies on the infliction of certain and severe penalties. If an offender has only a slight chance of being apprehended (and subsequently punished) for his crime, the punishment, no matter how severe, may have little deterrent effect. Only if punishment is reasonably certain can it have a meaningfully deterrent impact. The punishment must also be adequately severe so as “to prove aversive”.<sup>7</sup> The need for punishment to be both certain and severe thereby requires the cooperation of multiple criminal justice agencies. The severity of a punishment can be set by the courts, but they have no control over the certainty of apprehension and prosecution.

A review of deterrence research carried out in 1999 demonstrated the unlikelihood of the severity of punishment affecting one’s criminality.<sup>8</sup> One reason for this is the lack of certainty in punishment. It has been estimated that only two percent of offences result in a conviction.<sup>9</sup> Many offences go undetected. Others are reported but are not followed up by the police, or proceedings are dropped at some point during the investigation. The use of diversionary powers to impose cautions and fixed penalty notices reduces the number of offences dealt with by the courts further still. There may, however, be evidence that the certainty of the imposition of *some* punishment does have a deterrent effect. During police strikes in Liverpool in 1919 and Melbourne in 1923, there was widespread crime and civil disobedience as, no doubt, people realised that there could be no legal consequences to their actions.<sup>10</sup>

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<sup>7</sup> Roberts & Ashworth (2009), at 40

<sup>8</sup> von Hirsch, Bottoms, Burney & Wilkstrom (1999)

<sup>9</sup> Barclay & Taveres (1999)

<sup>10</sup> See Bagaric (2001), at 146

Deterrence fails to consider the point that offenders may cease their offending behaviour for any number of reasons. The offence may have been a one-off lapse of judgement, the offender may have no need to reoffend, or another opportunity to offend may not again present itself. None of these possible reasons rely on an offender's fear of being subject to more punishment.<sup>11</sup>

### 1.2.2 Incapacitation

Whereas deterrence seeks to reduce crime through the use of fearful consequences, incapacitation imposes restrictions on the offender to make them *incapable* of offending. Similarly to deterrence, incapacitation is based primarily on future conduct and calculating an individual's risk of reoffending. Where a person demonstrates no future risk, protection of the public may be an unnecessary consideration, so incapacitation would not apply. Indeed, the application of incapacitation is usually confined to dangerous and persistent offenders.<sup>12</sup> A number of penalties may have an incapacitative effect, but only capital punishment incapacitates absolutely.<sup>13</sup> Whilst imprisonment eliminates an offender's risk posed to the public, he remains a risk to other inmates and prison property. Nonetheless, incapacitation usually refers to an offender's inability to offend *within society*. There may be very little to criticise the normative stance that persons likely to present a risk to the public should be restrained, particularly where the offender has a propensity toward seriously violent or sexual conduct.<sup>14</sup>

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<sup>11</sup> Ibid, at 141

<sup>12</sup> Ashworth (2010a), at 84

<sup>13</sup> Bagaric (2001), at 128

<sup>14</sup> Indeed, these have been separated from other types of offending by the English legislature. Section 2(2)(b) CJA 1991 provided the courts with a power to impose a custodial sentence on an offender whose offence was violent or sexual in nature, and the term should not have exceeded that which is "necessary to protect the public from serious harm from the offender."



Perhaps the main objective toward incapacitation is the inability to accurately distinguish between those offenders who will reoffend and those who will not. There is a danger of identifying 'false positives'; that is labelling a low-risk offender as high-risk.<sup>15</sup> Any consequent punishment imposed which is aimed to incapacitate the offender is thereby undeserved and unnecessary.<sup>16</sup> In predicting risk, "the predictor has to rely on correlations between the offenders' currently observed characteristics and any subsequent criminal behaviour on their part."<sup>17</sup> Studies examining the accuracy of forecasting recidivism report a high rate of false positives, ranging from one true positive for every eight false positives, to one true for every two false positives.<sup>18</sup> If this assertion is to be believed, the number of false positives always outweighs the number of true positives, which is clearly indicative of the general inability to predict risks of recidivism.

### 1.2.3 Rehabilitation

Rehabilitation aims to reduce an offender's propensity to reoffend by tackling those factors which contribute to his criminal conduct. The intended result is that crime is reduced as the offender no longer wants to offend. Perhaps the most obvious example of reformation is drug rehabilitation. Where an offender is propelled to offend due to a drug or alcohol dependency – as may be the case for many acquisitive crimes – his need to offend can be removed by eliminating the criminogenic need. Rehabilitation may be an equally desirable aim of sentencing for offenders with anger management issues or where the offender has a disregard for the impact his offending has on others. Rehabilitation may therefore aim to

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<sup>15</sup> von Hirsch (1976), chapter 3

<sup>16</sup> Ashworth (2010a), at 84

<sup>17</sup> von Hirsch (1976), at 22

<sup>18</sup> von Hirsch (1998a), at 100

change a circumstance surrounding the offender (e.g. a drug addiction) or may seek a change of attitude in the offender.

There was an early scepticism surrounding rehabilitation as an appropriate sentencing goal. Following extensive research, Martinson found that no empirical study had established that any rehabilitation programmes had actually reduced reoffending.<sup>19</sup> More recently, this scepticism has been softened somewhat following a demonstration that rehabilitation may be successful for some offenders in some circumstances.<sup>20</sup>

Rehabilitation has been criticised for purportedly permitting grossly disproportionate penalties. An offender who has committed a relatively minor offence due to an ingrained drug addiction may require a prolonged period of treatment. However, utilitarians claim that in such cases rehabilitation may not be justified: "if the only way to reform an offender who steals a loaf of bread is to subject him to a prolonged period of treatment, then it is obvious that the 'cure' is worse than the 'illness', and would for that reason alone be rejected."<sup>21</sup> From a utilitarian's point of view, this statement seems questionable for two reasons. Firstly, rehabilitation is a 'forward looking' aim of sentencing. It is primarily concerned not with what the offender has already done, but what he may do in the future. Ten's statement fails to give any weight to the possible future conduct of his hypothetical bread thief and instead focuses on the minor current offence. Secondly, Ten effectively discounts persistent petty offenders from rehabilitation; a group who would no doubt constitute a large proportion of those entering treatment and other reformatory programmes.

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<sup>19</sup> Martinson (1974), at 25

<sup>20</sup> Brody (1998), at 10

<sup>21</sup> Ten (1987), at 142

The effectiveness of rehabilitation is often measured in terms of reconviction rates. But, as Ashworth points out, there are significant deficiencies to this method.<sup>22</sup> Firstly, not all crimes are reported. Many offenders may be wrongly thought to have been successfully reformed when, in reality, they continue to offend. Secondly, reconviction rates do not consider the frequency or seriousness of the reoffending. An offender may significantly reduce his offending, but would not be regarded as a successful rehabilitant even though real progress may have been made.

#### 1.2.4 Desert

Deterrence, incapacitation and rehabilitation are all chiefly concerned with reducing reoffending. To that end, they are forward-looking justifications, focusing primarily on looking ahead to predict the level of risk posed by the offender (or in the case of general deterrence, the risk posed by other likeminded potential offenders). Desert, on the other hand, is a backward-looking theory. It is principally concerned with what the offender has done rather than what he may do in the future. Different desert theories have taken different approaches to explaining why punishment is justified. Michael Moore has claimed that persons guilty of criminal offences should be punished for the same reason as those who are guilty of civil wrongs should be ordered to pay damages. Not only does this justify the infliction of state punishment, but it places society under a *duty* to punish.<sup>23</sup> An alternative justification for the infliction of punishment was adopted by John Finnis,<sup>24</sup> Michael Davis<sup>25</sup> and the earlier writings by Andrew von Hirsch,<sup>26</sup> based on an 'unfair advantage'. The theory

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<sup>22</sup> Ashworth (2009a), at 4

<sup>23</sup> Moore (2009), at 110

<sup>24</sup> Finnis (1980), at 263-264

<sup>25</sup> Davis (1983)

<sup>26</sup> von Hirsch (1976), at 48-49

states that by committing an offence, the offender gains an unfair advantage over the law-abiding majority which the infliction of punishment would cancel out, thereby restoring the social equilibrium. Andrew von Hirsch, the leading proponent of desert, subsequently distanced himself from the 'unfair advantage' approach and now claims that offenders deserve to be censured for their wrongdoing. Punishment conveys the disapprobation of the offending behaviour, for which the offender should be censured.<sup>27</sup>

Perhaps more central to the desert theory is the question of how much punishment should be inflicted on an offender; a point on which desert theorists are more likely to agree. Whereas the forward-looking theories may allow lengthy sentences for relatively minor offences where such a penalty can be justified on grounds of crime reduction, desert only holds the offender accountable for his own actions and only his own actions should be used to determine the severity of the sentence. The severity of the sentence imposed should therefore reflect the seriousness of the offence; the more serious the crime, the greater the punishment that ought to be imposed. This approach obviously requires some method of measuring crime seriousness and sentence severity, which will be considered in chapter two.

### 1.2.5 Primary Justification for Sentencing

In the interests of consistency and fairness, a penal system must adopt a justification for sentencing. Quite how this justification is offered is a matter of judgement.<sup>28</sup> Failure to provide a justification would lead to decisions being made not on principle, but on the sentencer's own intuitions, which may not correspond with those of others. Indeed, even

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<sup>27</sup> von Hirsch (1993)

<sup>28</sup> Andrew Ashworth highlights a number of methods used to import principle into sentencing, including judicial self-regulation, sentencing guidelines, and statutory regulation. See Ashworth (2009b).

where a justification is offered, intuition may still play a role in the determination of sentence. The Criminal Justice Act 2003 now offers five purposes of sentencing; punishment, reduction of crime through deterrence, rehabilitation, public protection and reparation.<sup>29</sup> No primary rationale is offered. Sentencers must consider each of the rationales listed and then select one to give priority to.<sup>30</sup> However, other provisions in the 2003 Act highlight the importance of desert, and it is this that the Sentencing Guidelines Council later adopted as the focus of its guidelines.

### 1.3 The Aims of the Study

The overarching aim of the study is to assess the ways in which the courts construct proportionality in theft cases and to assess the extent to which the courts adopt other sentencing philosophies which may or may not be consistent with proportionality. Following this, the research moved to consider the extent to which there is evidence of the courts applying a consistent sentencing approach that is in line with the relevant principles and policies in cases of theft.

The study focuses on proportionality because this formed the basis of the framework contained within the Criminal Justice Act 1991. Subsequently, although the 2003 Act purported to move away from proportionality somewhat by also referring to crime reduction aims, the guidelines emanating from the Sentencing Guidelines Council have focused almost entirely on the proportionality principle by guiding all sentencing courts to

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<sup>29</sup> Section 142(1) CJA 2003

<sup>30</sup> Ashworth (2010a), at 78

“start by considering the seriousness of the offence”<sup>31</sup> and by basing its sentence starting-points and ranges on the gravity of the offence.

#### 1.4 Why Study Theft?

Until recently little attention has been paid to the sentencing of offenders convicted for theft,<sup>32</sup> a somewhat surprising fact considering the large number of offenders convicted and sentenced for the offence.<sup>33</sup> Although there are examples of serious thefts (for example high value, sophisticated offending in breach of trust), theft often lies at the lower end of the offence-seriousness scale, almost certainly below many of the offences against the person (where the physical harm caused is likely to be considered more serious) and does not rank as highly as some other property offences, a number of which might amount to aggravated forms of theft (such as robbery). That is not to say that the offence is not serious. The broad scope of the offence means that on occasions an offender may be charged and subsequently convicted for theft where his actions fall just short of what is often considered a much more serious offence, such as robbery. Furthermore, as part of the offence’s mens rea, a consequence of being convicted for theft attaches to the offender a label of dishonesty, which may in itself carry with it a certain stigma, whilst also adversely affecting areas of the offender’s life, chiefly employability.

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<sup>31</sup> Sentencing Guidelines Council (2004a) para 1.3

<sup>32</sup> During the latter part of 2006, the Sentencing Guidelines Council published two related consultation papers; *Theft from a Shop* and *Theft and Dishonesty*. The Court of Appeal also considered the matter in its guideline judgment *R v Page, Maher and Stewart* [2005] 2 Cr App R (S) 37.

<sup>33</sup> See for example Ministry of Justice (2010b)

Cases of theft rarely reach the Court of Appeal or beyond, thereby limiting the number of reported cases, and research studies on the subject are rarer still.<sup>34</sup> Yet sentencing for theft offences raises a greater number of issues and questions for the sentencing court to consider than would be apparent in more serious cases where, perhaps, custodial sentences may be largely inevitable. Where the courts are dealing with serious forms of violent or sexual conduct, the court may not need to consider the suitability of the various community sentences, less still financial penalties and discharges. Similarly, with more minor non-imprisonable offending, the courts do not have to consider all options since, by their very nature, custody is not available to the courts when dealing with such offences.

Theft, on the other hand, sits somewhere between these poles. For some forms of the offence, the courts would no doubt consider imposing a custodial sentence. For other thefts, the offence may require no greater intervention than a mere discharge. In short, sentences for theft may feature the entire range of penalty types, from discharges through to custody.

Although theft may be most commonly committed by offenders of a particular age, gender and ethnicity, the offence may be (and is) committed by a broad range of types of offender, as demonstrated in Chapter Six. Other offences may only be committed by a subgroup of offenders: buggery and indecency between males both may only be committed by males, and may be most commonly committed by adults rather than young offenders. Such offences do not, therefore, raise issues concerning equality, the sentencing of women and the relevance of the offender's age, all of which may need to be considered when sentencing for theft.

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<sup>34</sup> Though see exceptionally, Speed & Burrows (2006), a study conducted on behalf of the Sentencing Advisory Panel. The study was limited to consideration only of theft from shops and did not offer an analysis in relation to sentencing philosophy. The study is discussed further in Chapter Three.

It is worthwhile taking time to briefly examine the nature of the research and to explain its significance. One research study has previously been completed on sentencing practice in theft cases,<sup>35</sup> which had been announced a few months after work for this project commenced. The earlier work offered a statistical representation of sentencing trends in shoplifting cases. The present study, on the other hand, is not limited to consider only retail theft. Rather it embraces any subcategory of the offence falling within section 1 of the Theft Act 1968. The earlier work did not have as its purpose to offer an analysis of the trends within a theoretical context. This project considers sentencing practices and principles within a proportionality-based theoretical context. This study consequently becomes the first to combine theoretical and empirical elements specifically to sentencing for theft.

## 1.5 Outline of the Thesis

Chapter Two introduces the principles of proportionate sentencing. It considers the theory of just deserts, and how proportionality has been adopted by the English sentencing framework under the Criminal Justice Acts of 1991 and 2003. Chapter Three builds upon Chapter Two by detailing the sentencing principles and practices particular to theft. This includes the courts' sentencing powers, sentencing guidelines and guidance on mode of trial and committal to the Crown Court.

Chapter Four discusses the quantitative and qualitative methods employed to collect and analyse the empirical data for this study.

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<sup>35</sup> Speed & Burrows (2006)



Chapter Five is the first of three analysis chapters; it examines the offence related factors and procedural issues which impact on the sentencing decision. The main focus of the thesis is on the sentence type imposed, rather than the length or quanta. Since 1991, English law has worked with a sentence hierarchy, with all custodial sentences being deemed to be more severe disposals than any non-custodial measures. Similarly, all community-based sentences are more severe than all fines and discharges, whilst also being less punitive than a custodial sentence. Extending the previous chapter beyond factors relating to the offence, Chapter Six deals with the factors and characteristics of the offender which appear to affect the sentence outcome. Chapter Seven offers an analysis of a series of interviews with judges, magistrates, and probation officers conducted for this project.

Chapter Eight draws together the previous three chapters by offering a theoretical explanation of sentencing practice in theft cases. More specifically, it identifies the extent to which the courts appear to uphold the principles of proportionality, the role played by other sentencing justifications and the extent to which these may sacrifice the courts application of proportionate sentencing.

Finally, Chapter Nine concludes the thesis by highlighting the implications of the study's findings and possible areas for reform.

## **CHAPTER TWO**

### **GENERAL SENTENCING PRINCIPLES AND PROPORTIONALITY**

#### **2.1 Introduction**

In England and Wales, sentencing discretion is controlled through legislation and guidelines which seek to promote a consistent principled approach, although not necessarily as clearly as it may have been hoped. 1991 saw the government implement the first piece of legislation aimed at introducing a principled approach to sentencing. The Criminal Justice Act 1991 was centred on notions of proportionality, requiring the severity of the sentence imposed to reflect the seriousness of the crime. This endeavour for proportionality has continued, albeit somewhat diluted by various provisions pertaining to crime reduction, through to the current legislation, the Criminal Justice Act 2003.

This chapter will discuss the role played by proportionality within the English sentencing framework, along with some discussion concerning general desert theory which informs the approach taken in England and Wales.

## 2.2 Measuring Proportionality

Here it shall be assumed that there exists a valid justification for inflicting punishment on those guilty of committing criminal offences. The issue for consideration therefore turns to determining the amount of punishment to inflict. This raises the main distinguishing feature of proportionality:<sup>1</sup> that the severity of the punishment imposed should be commensurate with the seriousness of the offence. The principle is based upon a notion of fairness, made apparent by the assertions that only persons found to have breached the criminal law deserve to be punished, and the amount of punishment deserved should reflect the seriousness of the offence. During the resurgence of the theory, von Hirsch, probably the most notable living desert theorist, claimed that serious wrongs deserve severe punishment, whereas lesser wrongs warrant less severe penalties.<sup>2</sup>

Through intuition, it is possible to recognise a grossly disproportionate sentence which could be imposed for a given offence.<sup>3</sup> Such a sanction may be disproportionately severe or disproportionately lenient. These sanctions may be easily recognised as grossly disproportionate since they are so far removed from what could intuitively be deemed proportionate. If a penal system were to embrace proportionality as only a limiting principle,<sup>4</sup> this intuition alone may be sufficient. However, if a sentencing framework is to adopt the notion of proportionality as a principle for determining the sentence, some more precise method of measuring the seriousness of an offence and the severity of a sentence

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<sup>1</sup> According to Ashworth (2009c), at 104

<sup>2</sup> von Hirsch (1976), at 66

<sup>3</sup> One's perceptions of what constitutes a proportionate sentence to a given crime will also be influenced by culture. Responses such as amputation and flagellation may be deemed appropriate for certain crimes in the Middle-East, but may not receive the same level of support in Western Europe.

<sup>4</sup> See Morris (1981); Morris (1974), at 73-77, where it is suggested that the concept of desert should be used only to set the upper and lower limits of desert, thereby identifying what is not *disproportionate*, rather than identifying more precisely what is proportionate. For a critique of this concept of limiting retributivism, see von Hirsch (1985), chapter 4

must be formulated.<sup>5</sup> The most plausible approaches to addressing these requirements will now be addressed.

### 2.2.1 Offence Seriousness

One problem concerning proportionality has been the subjective meanings attached to 'seriousness'; some may judge the term in relation to the amount (or type) of harm caused or risked to the victim, whereas others may define seriousness in moral terms:<sup>6</sup> stealing £10 from a charity donation box may be considered more serious by some than stealing the same amount from (say) an insurance firm, even though the loss suffered is the same for each. During the infancy of modern desert theories, Andrew von Hirsch suggested that offence seriousness should be calculated by reference to "the harm caused (or risked) by the act and on the degree of the actor's culpability".<sup>7</sup> This general premise has been accepted by many,<sup>8</sup> although there has been less consensus regarding how to calculate both harm and culpability, and whether they should carry equal weighting or whether one ought to be considered more important than the other. The premise that seriousness is a composite of harm and culpability has more recently been accepted by the English legislature and can now be found in section 143(1) of the Criminal Justice Act 2003:

In considering the seriousness of any offence, the court must consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused.<sup>9</sup>

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<sup>5</sup> For a critique, see Walker (1991), who disputes the viability of these scales: "fitting together two scales whose rungs are as loose and interchangeable as this is not as simple as the proportionalists make out." At page 102

<sup>6</sup> Walker (1978), at 360

<sup>7</sup> Von Hirsch (1976) at 69

<sup>8</sup> Including adoption by the SGC. SGC (2004a)

<sup>9</sup> According to Michael Davis, an offender who risks or intends, but does not cause, harm still deserves punishment for his attempted offence because of the risk of harm he has taken, which a law-abiding person would not take. At the same time, an inchoate offence deserves less punishment than a complete offence because risking harm is not taking as great an advantage as causing harm. "To attempt murder...is not worth as much [punishment] as to succeed at it. The successful murderer has the advantage of having done what he set out to do. The would-be murderer whose attempt failed has only had the *chance* to do what he set out to do. The difference is substantial." See M. Davis (1992), at 116

The 2003 Act does not consider the individual importance of either harm or culpability, or even what the terms mean, leaving considerable scope for subjective interpretation. There is little doubt that one would rule a particularly heinous sexual offence as more serious than a 'petty' shoplifting offence,<sup>10</sup> but how much more serious is it? Also, when comparing two particularly emotive crimes, such as rape and murder, or when comparing variations of the same offence (e.g. murdering a child compared with murdering an elderly person) there may be less chance of achieving an overall principled consensus as to which is the most severe, or indeed by how much more severe one is than the other.<sup>11</sup>

Harm and culpability are each compounds of numerous offence factors to be considered. The number of victims, offending against particularly vulnerable victims, repeat offending against the same victim, offending in the presence of children, the value of the property stolen, and the use or threat of force, are all factors affecting the *harm* caused by the offence. An offender's moral culpability will be affected by, for example, offending whilst on bail or on licence, abusing a position of trust, committing an offence motivated by hostility towards the victim's race, disability or sexual orientation, the offender's previous criminal record,<sup>12</sup> the level of planning of the offence, the offender's age, and the fact that the offender played only a peripheral role in the offence.<sup>13</sup>

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<sup>10</sup> Although see Sparks, Genn & Dodd, (1977), where citizens were asked to assess the relative seriousness of numerous offences, the sale of marijuana to a 15-year old received a higher average score than rape, although the authors remarked that this might have "resulted from a general ignorance among our sample as to the nature of marijuana." (at page 185)

<sup>11</sup> For discussion on varying perspectives on the severity of fatal offences, see Mitchell (1998)

<sup>12</sup> J. V. Roberts claims that the presence of previous record enhances the offender's culpability. See Roberts, (2008a), and section 2.4.1 below.

<sup>13</sup> For a fuller, although non-exhaustive, list of factors affecting harm and/or culpability, see Sentencing Guidelines Council (2004a)

### 2.2.1.1 Harm

An early attempt to calculate harm (known as the 'welfare interest' analysis) was put forward by Joel Feinberg who suggested that harms should be compared in light of the extent to which they infringe a person's choices.<sup>14</sup> Many violent offences, for example, would be seen as particularly harmful because a person's choices may be significantly curtailed following serious physical injury. This approach was later criticised as being "somewhat artificial".<sup>15</sup> Von Hirsch accepted that a significant physical injury would interfere with one's choices, but this does not explain why our interest in avoiding such injury is so important.<sup>16</sup> Rather, von Hirsch proposed, it would be more logical to judge our interest in avoiding pain through how such pain would affect the quality of one's life. This led to perhaps the most widely accepted account of how to gauge harm: the 'living-standard' analysis.<sup>17</sup>

The term 'living-standard' refers to the quality of a person's existence.<sup>18</sup> It focuses not on "actual life quality or goal achievement, but on the means or capabilities for achieving a certain quality of life. It is standardised by referring to the means and capabilities that would ordinarily help one achieve a good life."<sup>19</sup> Since it is standardised, the living-standard does not have the added complexity of ruling what, say, a wealthy, professional person needs to maintain a good life compared with what a less affluent person may require. The primary advantage in using the living-standard as a means of gauging harm is that it fits in well with the way harms are usually judged:<sup>20</sup> no doubt most would view a serious, violent attack on a

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<sup>14</sup> Feinberg (1984)

<sup>15</sup> von Hirsch (1993) at 30

<sup>16</sup> Ibid.

<sup>17</sup> Comprehensively considered in von Hirsch & Jareborg, (1991); see also von Hirsch (1993) chapter 4 and von Hirsch (1998b) at pages 185-190

<sup>18</sup> von Hirsch & Jareborg, (1991), at 10

<sup>19</sup> Ibid

<sup>20</sup> von Hirsch (1998b), at 186

person which leaves the victim paralysed as more serious than theft of a vehicle because the former has a greater adverse effect on the victim's quality of life than the latter.

In order to produce a workable model, harms need to be categorised. Von Hirsch and Jareborg suggest that most identifiable harms fall into one of four types: (1) physical integrity, (2) material support and amenity, (3) freedom from humiliation, and (4) privacy.<sup>21</sup> Each of these is then split into four grades reflecting the level of harm: (1) subsistence, (2) minimal well-being, (3) adequate well-being, and (4) enhanced well-being.<sup>22</sup> Subsistence refers to a person's survival, and as such constitutes the highest level of harm. The remaining three levels refer to varying degrees of life quality beyond mere survival. By way of example, homicide would clearly destroy a person's subsistence (level one) and would therefore be classed as the most serious harm. Conversely, stealing an apple from a person's orchard would cause little, if any, harm and would therefore fall under level four (or below since such harm may not even qualify as infringing a person's 'enhanced well-being' and may not justify criminalisation).

To demonstrate how the living standard would work in practice, von Hirsch and Jareborg consider an example of residential burglary where the offender breaks into the victim's house while the victim is away and steals a television set.<sup>23</sup> Firstly, two different categories of harm have been breached; material support and amenity, and privacy. The material loss consists of the loss of the television and the inconvenience and consequent loss of having the locks repaired. The privacy-intrusion consists of the unauthorised entry into the house. Secondly, both these categories of harm must be rated: a replacement television can be purchased at a modest cost, so the impact on the person's living-standard is not particularly

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<sup>21</sup> von Hirsch & Jareborg, (1991), at 19

<sup>22</sup> Ibid, at page 17

<sup>23</sup> Ibid, at page 20

great, especially if the victim is insured against such loss (although this should not mitigate the seriousness of the offence). However, the rating may well be higher for the breach of privacy, though not significantly higher as the victim's feelings that their privacy has been invaded are finite, and usually diminish with time.<sup>24</sup> Where more than one incident of harm is caused it is necessary to combine the two harm ratings together to form the overall harm rating. For composite offences involving more than one type of harm, or for multiple offences involving several counts of the same harm, it seemed only logical to assume that the harm ratings for each element should be aggregated to create the total harm rating. Following a public survey, Wagner and Pease found that this 'additivity' assumption was incorrect.<sup>25</sup> The authors had asked respondents to judge whether the commission of two counts of a specified offence was twice as serious as only one count of the same offence. Only 18 percent of respondents believed that two offences were exactly twice as serious as a single offence, evidence that 'additivity' only held for a minority of the respondents.<sup>26</sup> This finding led Wagner and Pease to conclude that "the combination of judgements of offences is far more complex than the [additivity] assumption would imply."<sup>27</sup>

Although the living standard model identifies types and levels of harm, it does not offer a calculable measurement of harm, or any analysis of the interrelationship between the types and levels of harm: how much more serious is a harm affecting one's minimum well-being compared to adequate well-being? The authors offer no answer to this.

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<sup>24</sup> See Maguire & Bennett (1982) where the authors confirm that "about one-quarter of those who actually become victims are, temporarily at least, badly shaken by the experience." Moreover, a small minority...suffer long-lasting effects including fear, sleeplessness and a deep distrust in others." (at pages 164-5) Therefore, a large majority of victims do not suffer from such long-term effects following a residential burglary, though no doubt they *do* suffer from some short-term effects. The same may not be true of offences such as rape, where the victim is more likely to suffer long-term or perhaps permanently.

<sup>25</sup> Wagner and Pease, (1978), at 178

<sup>26</sup> Ibid, page 177

<sup>27</sup> Ibid, page 178



### 2.2.1.2 Culpability

The issue of culpability is, *prima facie*, less troublesome than that of harm. The substantive criminal law in most jurisdictions (including England and Wales) already distinguishes various forms of mens rea including intention, recklessness and negligence, along with a variety of excuses and justifications such as self-defence, crime prevention and provocation. An offender's culpability will be assessed, as least in part, by his mens rea coupled with any recognised excuse or justification he has for committing the offence. This will affect the seriousness of the offence. It should be possible to reflect these distinctions in a sentencing framework, so as to take account of an offender's mens rea (along with any defence) when calculating culpability. That is not to say that producing a scale on the basis of an offender's culpability would be a trouble-free task: there would still be considerable work to be done in calculating how much worse, say, intention is compared to recklessness.<sup>28</sup> It would also be necessary to consider the importance to be attached to any apparent defence, justification or excuse the offender might have which led to the offence being committed.<sup>29</sup> The importance of any defence will depend initially on whether it reduces or extinguishes liability completely. A complete defence will absolve the defendant of any criminal liability, notwithstanding any mens rea on the defendant's part, whereas a partial defence will merely diminish the defendant's blameworthiness, either leading to a reduction in sentence or a conviction for a lesser offence, which may also carry a lesser penalty.<sup>30</sup> The task would be further aggravated by the need to look at an offender's culpability in conjunction with the harm caused or risked.

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<sup>28</sup> But culpability must be measured in reference to the harm caused: a reckless killing would be considered more serious than an intentional theft due to the former involving greater harm, notwithstanding the fact that the offender culpability in the latter is greater. See further section 2.2.1.3 below

<sup>29</sup> Gardner suggests that culpability (or blameworthiness) has a four-part formula. To be culpable, an offender must (a) have committed a prohibited act and (b) have been responsible for committing it, whilst lacking any (c) justification or (d) excuse for having done it. See Gardner (1998) at page 43.

<sup>30</sup> For example, s.2 of the Homicide Act 1957 which introduced 'diminished responsibility' as a partial defence to murder, entitling the defendant to be convicted of the lesser offence of manslaughter. Unlike murder, manslaughter does not carry mandatory life imprisonment.

### 2.2.1.3 Combining harm and culpability

The assessment of offence seriousness requires a consideration of the relationship between harm and culpability. The two are not completely separable: “the extent of someone’s culpability for an action is [not] independent of the particular substance of that action.”<sup>31</sup> Since one does not deserve conviction or blame for committing a ‘good’ act,<sup>32</sup> culpability relies on the presence of harm in order for the act to be deemed criminal. Similarly, a person who accidentally causes harm, and who therefore cannot be considered morally culpable, does not generally commit an offence.<sup>33</sup> What is clear from this is that both harm and culpability are usually required for a criminal act to have been committed. What is less clear is the individual weighting which ought to be given to both harm and culpability. This can be particularly troublesome where an offence involves low-level harm but a high level of culpability, or vice versa.

A considerable number of public surveys on the perceived seriousness of crimes have been conducted over the last six decades,<sup>34</sup> although there are inherent dangers with undertaking such studies. Richard Sparks suggested that the seriousness of an offence depends not on people’s perception of the harm, but on the actual (or risked) harm.<sup>35</sup> To the extent that respondents may overestimate or underestimate the harm caused or risked, public perceptions of seriousness will fail to provide a reliable basis for rating the gravity of offences.<sup>36</sup> Respondents may not fully understand the offences they are being asked to

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<sup>31</sup> A.P. Simester & A.T.H. Smith (1996), at 13

<sup>32</sup> Ibid

<sup>33</sup> Unless the offence committed is recognised as a ‘strict liability’ offence thereby requiring little or no fault on the offender’s part.

<sup>34</sup> The first such study was Sellin & Wolfgang (1964), although this was limited to consider offending by juveniles.

<sup>35</sup> Cited in von Hirsch (1983), at 215

<sup>36</sup> Ibid.

rank.<sup>37</sup> Furthermore, opinion surveys on crime seriousness often fail to provide sufficiently comprehensive offence descriptors, leaving the respondents to question the full circumstances surrounding the offence and interpret the facts differently to one another, which may have an effect on the perception of seriousness. Monica Walker's study attempted, to an extent, to avoid this problem by providing short offence descriptions (rather than merely listing the names of offences and asking respondents to rank them).<sup>38</sup> However, Walker's descriptions did not express the level of planning, the offender's motive, or (in property crimes) whether the property was recovered. Each of these issues could have a bearing on the perception of seriousness. By failing to address them, there is a real possibility that different respondents could view the offences in different ways.<sup>39</sup>

Walker's study asked respondents to gauge the seriousness of 11 criminal offences (a control offence, and pairs of burglaries, shopliftings, frauds, income tax evasions, and violent offences). For each pair of offences involving money (i.e. not the control offence or the violent offences), the facts presented to the respondents were the same, save for the amount of money involved: one burglary, shoplifting, fraud and tax evasion involved sums of £100, the other involved only £1. The study used three methods: paired comparisons whereby respondents were asked to identify the most serious offence from a pair, a category scale where the respondents were required to rank each offence in order of perceived seriousness (from 1 – 11), and a magnitude scale where each offence was scored in relation to the control offence, which was assigned a score of 10. Walker found that, regardless of which method was adopted, the mean ranking of offences was generally the same. Using the mean score,

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<sup>37</sup> In a survey conducted by Sparks, Genn and Dodd, the sale of marijuana to a 15 year old received a higher mean seriousness score than rape, due perhaps to "a general ignorance amongst our sample as to the nature of marijuana." Sparks, Genn & Dodd (1977), at 185

<sup>38</sup> Walker (1978)

<sup>39</sup> Ashworth (2005) at 104

the more serious of the two violent offences<sup>40</sup> was always the most serious of the 11 offences offered. The least serious offence was the income tax evasion involving £1.<sup>41</sup> The study found that the type of harm is not the only factor in determining the seriousness of an offence; respondents also appeared to consider the amount of harm caused. Consequently, the more serious examples of shoplifting<sup>42</sup> and fraud,<sup>43</sup> both involving economic losses of £100, ranked higher in seriousness than the less-serious of the two violent offences.<sup>44</sup>

When comparing each of the more serious examples of the monetary offence with its corresponding less serious example (i.e. to compare the seriousness of the £100 shoplifting and the £1 shoplifting), Walker found that the difference in the perceived seriousness of stealing £100 from a shop compared with stealing £1 from a shop was greater than the difference in the perceived seriousness of stealing £100 during a burglary compared with stealing only £1 in the course of a burglary.<sup>45</sup> This suggests that the value of the property stolen during the course of a burglary is less important than the value of the property in a shoplifting. As a composite offence, burglary may involve theft whilst trespassing; the trespass may assume a greater role in determining the seriousness of the offence.

As previously mentioned, public opinion surveys on the seriousness of crimes often fail to provide adequate offence descriptions to offer the respondents sufficient information to inform their scoring. Even those studies where a brief scenario is provided for each

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<sup>40</sup> "A man comes home from work and finds his wife has been gossiping with the neighbours all day; the house is a mess and his meal is not cooked. He attacks her with a knife and she needs three stitches in her arm." The less serious violent offence involved a lesser degree of harm: "A man comes home from work and finds his wife has been gossiping with the neighbours all day; the house is a mess and his meal is not cooked. He hits her on the arm and face and bruises her."

<sup>41</sup> "A man does some work in his spare time and earns money above his normal income. He does not report this to the income tax inspector and thus avoids paying £1 in tax."

<sup>42</sup> "A man goes into a department store and deliberately comes out with goods worth £100 for which he has not paid."

<sup>43</sup> "A man is in charge of the funds of a club to which he belongs. He steals £100 of the money and alters the books."

<sup>44</sup> "A man comes home from work and finds his wife has been gossiping with the neighbours all day; the house is a mess and his meal is not cooked. He hits her on the arm and face and bruises her."

<sup>45</sup> Walker (1978)

offence,<sup>46</sup> the mental element of the crime usually goes unaddressed. Leslie Sebba's study, however, was designed to examine the relevance of the mental element to the perceived seriousness of an offence.<sup>47</sup> As hypothesised, he found that the mental element was relevant to the perception of seriousness. An intended result was considered more serious than recklessness, which itself scored higher on the seriousness scale than negligence.<sup>48</sup> Sebba's study demonstrated the importance of both culpability and harm in the determination of offence seriousness, reiterating the fact that the two are interlinked and may be equally relevant to measuring the seriousness of crime.

### 2.2.2 Sentence Severity

In order to establish whether a sentence is proportionate, having assessed the seriousness of the offence, it is necessary to gauge the severity of a punishment. Comparing custodial sentences with one another is *prima facie* straightforward: the comparison can be drawn by reference to the duration of the prison terms<sup>49</sup> (although differing prison conditions and the variations in prisoners' reactions to being imprisoned may also be relevant). Clearly, six months' imprisonment is less severe than one year imprisonment if both terms were to be served in the same prison, under the same conditions. However, the living conditions may vary between different institutions, rendering a longer period of imprisonment in a more humane institution as comparable to a shorter term in a facility with less favourable conditions.<sup>50</sup> The circumstances of the offender may also be relevant to the determination of sentence severity: a 70-year-old is assumed to endure greater hardship during one year'

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<sup>46</sup> See, for example *Ibid.*

<sup>47</sup> Sebba (1980)

<sup>48</sup> *Ibid.*, at page 129-130

<sup>49</sup> von Hirsch (1983), at 218

<sup>50</sup> *Ibid.*

imprisonment than a 30-year-old.<sup>51</sup> The comparative severity of financial penalties may also be straightforward. A £5,000 fine is considerably more severe than a £50 fine when imposed on the same offender. But the severity of a fine relies heavily on an individual's financial circumstances. A £1,000 fine levied against a wealthy offender may be significantly less severe than a £100 fine imposed on an impoverished offender.

The real difficulty in assessing severity of penalties lies in comparing an intense non-custodial sentence with a short term of imprisonment, or comparing the same penalty when imposed on different offenders. Mara Schiff claimed that different sanctions can be compared on a single scale "by breaking different punishments into individual...elements" thereby facilitating the comparison of "seemingly dissimilar incarcerative and nonincarcerative punishments...using equivalent measurement standards" such as deprivation of liberty through restrictions on physical mobility and supervisory control.<sup>52</sup>

#### 2.2.2.1 Comparing Custodial with Non-Custodial Sentences

Morris and Tonry use proportionality only as a limiting principle. Rather than determining the sentence, proportionality should be used to identify and disregard any *disproportionate* sentence. According to Morris and Tonry, a sentence should not only be proportionate (or rather not disproportionate) but should also be appropriate given the individual offender's circumstances and available resources.<sup>53</sup> Consequently, two offenders convicted of the same offence, and sharing similar criminal histories, need not be given the same sentence: one may be particularly susceptible to treatment in the community, whereas for the other, a

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<sup>51</sup> Morris & Tonry (1991), at 95

<sup>52</sup> Schiff (1997), at 201

<sup>53</sup> Morris & Tonry (1991), at 43-4

community sentence may be anticipated to be entirely ineffective. As their scheme envisaged highly individualised sentences,<sup>54</sup> Morris and Tonry emphasised the need for a sentencing system to include interchangeable punishments, particularly when dealing with offences within the middle range of seriousness where custody may be available as a disposal option but is not axiomatic.<sup>55</sup> In such cases, non-custodial sentences of comparable severity could be imposed in view of the circumstances of the individual case. To facilitate this, they proposed a scheme whereby punishments are rated according to severity units;<sup>56</sup> a short custodial sentence could be rated as severely (and thereby assigned the same number of severity units) as a longer period of probation, thereby allowing the two to be used interchangeably to select which is most appropriate in a particular case.<sup>57</sup> Some sentence types may not be interchangeable. The differences in deprivations imposed by, for example, prison and a discharge may be so stark that they could never lead themselves to interchangeability, no matter how lengthy the discharge and how short the prison sentence.

Various studies have attempted to measure sanction severity through opinion surveys. As with public surveys on crime seriousness, there are potential dangers involved with undertaking such studies. Responses given by members of the public must be treated with caution as the respondents may lack an accurate understanding of the precise nature of various penalties. Even where studies specifically target respondents with knowledge of different sanctions, those who have experience of serving custodial sentences are likely to perceive imprisonment as less severe than those who work within the criminal justice system who have not themselves experienced incarceration.<sup>58</sup> Compounding the subjective

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<sup>54</sup> "In sentencing, no generic man stands before the court, but countless individuals do. We think it axiomatic that questions of fairness and justice in criminal punishment must be weighed in individual terms", *Ibid*, at 94

<sup>55</sup> *Ibid*, at 77

<sup>56</sup> *Ibid*, at 74

<sup>57</sup> For a critique of Morris and Tonry's scheme, see von Hirsch (1993) page 65-68

<sup>58</sup> Moore, May & Wood (2008)

nature of perceptions of sentence severity, the inmates' characteristics (including gender) may also affect the perceived severity.<sup>59</sup>

Petersilia and Piper-Deschenes' American study asked male inmates about their perceptions surrounding various custodial and non-custodial sanctions.<sup>60</sup> The results showed that the inmates believed a small fine (\$100) was the least severe penalty of those listed, whilst a lengthy prison term (five years) was the most severe. More surprisingly perhaps, the respondents favoured a six-month jail term over a \$5,000 fine, though clearly, that is not to say the general public would hold the same views. The findings may have been distorted by the nature of the respondents. Since the respondents were all inmates, it is doubtful that they would have a reasonable, stable income. As a result, their views on monetary fines would be affected due to their (potential) lesser earning capacity. Secondly, since the respondents had all experienced imprisonment, they may view the experience in a different light compared to members of the general public. Those with no first-hand experience of the criminal justice system are more likely to fear the ordeal of imprisonment, whereas those who have experience of incarceration know what to expect and, perhaps, how to cope in custody.

The respondents of a further American study<sup>61</sup> were asked to rank the severity of various penalties, in comparison with a one-year jail term which was represented as 100 points on the severity scale. Respondents then assigned a number to each penalty, relative to 100 for one year in jail. The study led to four significant conclusions. Firstly, and similar to Petersilia and Piper-Deschenes' study,<sup>62</sup> custodial sentences were not always considered to be the most severe penalty: a lengthy period of probation was thought to be more severe than a

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<sup>59</sup> One study found that female inmates rated non-custodial penalties as less punitive than their male counterparts. See Wood & Graswick (1999)

<sup>60</sup> Petersilia & Piper-Deschenes (1994). The penalties listed were fines (\$100, \$1,000 and \$5,000), probation (one, three and five years), intensive probation (one, three and five years), jail (three months, six months and one year), and imprisonment (one, three and five years).

<sup>61</sup> Erickson & Gibbs (1979)

<sup>62</sup> See above



short period of incarceration.<sup>63</sup> Secondly, the perceived severity of a penalty appeared to be based on the type *and* the length of the penalty: the length of the penalty in itself was not of paramount importance<sup>64</sup> but, as mentioned above, a sufficiently lengthy non-custodial sentence could be more severe than a short term of imprisonment suggesting that the type of penalty is not always the most important factor in determining severity. Thirdly, the study found a non-linear relationship between the severity of different sanctions: the difference between one and five years (of any type of penalty, be it prison, jail, or probation) was greater than the difference between ten and fifteen years, even though the time span is the same.<sup>65</sup> Finally, using log transform models, the study was able to calculate the perceived severity of sentence lengths beyond those scored by the study's respondents. Consequently, the study found that one year in county jail (scoring 100 points) was equal to six months' in prison, 7.8 years on probation and a \$2,922 fine,<sup>66</sup> which helps to understand the interrelationship of various penalty types and the potential interchangeability of these.

A number of other studies have also found that a lengthy non-custodial option could be perceived as more punitive than a period of imprisonment. A study undertaken by Sebba and Nathan, which asked four groups of respondents (police officers, prisoners, probation officers and students) to rank 36 penalties according to their perceived severity, found that generally imprisonment was viewed as more severe than non-custodial penalties, with terms becoming increasingly severe as the length of term rose.<sup>67</sup> However, large fines and lengthy periods on probation were also perceived as severe, with a \$50,000 fine achieving an equivalent rating of between five and seven years' imprisonment, and 10 years on probation ranking between 12 and 18 months' imprisonment. For prison sentences of less than 12

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<sup>63</sup> Ten years' probation was given an average score of 116 points, compared with one year in jail which was assigned 100 points. See Erickson & Gibbs (1979), at 109

<sup>64</sup> One year in prison scored 164 points, compared with only 28 points for one year on probation.

<sup>65</sup> Erickson & Gibbs (1979), at 111

<sup>66</sup> Ibid, page 110

<sup>67</sup> Sebba and Nathan (1984), at 228

months, non-custodial sanctions could be viewed as more severe, with fines over \$500, suspended sentences over three years and probation orders over three years all ranking higher on the severity scale than one month imprisonment.<sup>68</sup>

Von Hirsch admits that proportionality is principally concerned only with the severity of penalties, and not their particular form.<sup>69</sup> This allows for penalties of comparable severity to be used interchangeably.

“This means that one might even substitute between short stints of confinement and the more substantial non-custodial sanctions – provided the severity-equivalence test has been met.”<sup>70</sup>

To use the findings of Erickson and Gibbs’ study discussed above, if six months’ imprisonment and 7.8 years probation are of comparable severity, then either penalty could be used interchangeably for offences whose seriousness warrants that level of punishment. Consequently, different penalties could be substituted on grounds of crime prevention. Where an offender poses a risk of reoffending, an alternative rehabilitative sentence could be imposed without undermining proportionality.

In their conceptual work on the scaling of penalties, Andrew von Hirsch and Martin Wasik put forward a suggested ‘limited substitutability model’, whereby a standard type of punishment would be prescribed for a particular offence, which would usually be the recommended disposal for a given type of offence.<sup>71</sup> There would however be a rule allowing for the prescribed penalty type to be substituted for another equally-severe penalty where the individual case warranted a different type of penalty. This substitution rule may be exercised where the court had reason to believe that the offender would be particularly

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<sup>68</sup> Ibid

<sup>69</sup> von Hirsch (1992), at 80

<sup>70</sup> Ibid

<sup>71</sup> von Hirsch, Wasik and Greene (1989), at 604; see also Wasik & von Hirsch (1988)

susceptible to a different type of penalty. Regardless of whether the prescribed sentence or a substituted penalty is imposed, principles of proportionality are still satisfied as the substituted penalty is of equal severity to the prescribed sanction.<sup>72</sup>

The notion of interchangeability between penalties of comparable severity does not sit easily with the approach taken by the English penal system. The ranking of sentence severity under the current law as contained in the Criminal Justice Act 2003, along with its predecessor, the Criminal Justice Act 1991, works in the form of a pyramid, requiring courts to “pass a threshold test before moving a case from one form of sentence up to the next.”<sup>73</sup> The courts may only impose a community sentence if the offence is ‘serious enough’ to warrant such a sentence.<sup>74</sup> Similarly, a custodial sentence may only be imposed on an offender if the offence is ‘so serious’ that such a disposal is warranted.<sup>75</sup> This approach scales severity purely in terms of the *type* of sanction: any custodial penalty is assumed to be more severe than any community penalty, which itself is more severe than any financial sanction. This does not conform with the empirical findings on perceived sentence severity which demonstrate that the severity of a punishment relies on the quanta as much as it does the type.

Austin Lovegrove claims that a short term of imprisonment is *not* necessarily more severe than a sufficiently punitive non-custodial sentence.

“Imprisonment is more severe than other sanctions only in the sense that for an equivalent period of imposition it places a greater burden on an offender... It is not more severe in the sense that any term of imprisonment is harsher than any term of another sanction; other sanctions if imposed for a sufficiently long period can be made more severe than the shorter term of imprisonment.”<sup>76</sup>

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<sup>72</sup> Ibid

<sup>73</sup> Ashworth (1992*a*), at 242

<sup>74</sup> S.6(1) Criminal Justice Act 1991, replaced by s.148(1) Criminal Justice Act 2003

<sup>75</sup> S.1(2)(a) Criminal Justice Act 1991, replaced by s.152(2) Criminal Justice Act 2003

<sup>76</sup> Lovegrove (2001), at 130-131

To set a threshold delineating custodial from non-custodial penalties on the basis of offence seriousness is misguided. As Spelman concluded, “the stark partition [between custodial and non-custodial sentences] exists only in penal codes [and] not in the minds of most offenders. A wide variety of alternatives to incarceration can deliver more punishment than can a short...prison term...”<sup>77</sup> This analysis of surveys has highlighted a long-cast doubt over the validity of a sentencing hierarchy with custody at the top end, and discharges at the lower end. Although the English legislature has assumed this hierarchy since 1991, the reality of sentence severity appears to be far more complex. Not only is the type of penalty relevant, but the extent, duration or amount of that penalty is equally valid as a determinant of sentence severity.

#### 2.2.2.2 Comparing Non-custodial Sentences

Community service (CPO) has traditionally been viewed as more punitive than probation (CRO) and thus is placed higher on the sentencing tariff, but changes to probation have led some to question whether this is still the case.<sup>78</sup> Unlike community service, probation requires the offender’s active participation in a (sometimes lengthy) programme, self-analysis, confronting his past behaviour and making plans to reduce the risks of future offending.<sup>79</sup> Community service does not require such self-analysis and there is a lower expectation placed on the offender that he will change.<sup>80</sup> The emphasis of community service is based on punishment (hence the term community *punishment* order), with little

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<sup>77</sup> Spelman (1995), at 130-132

<sup>78</sup> Harrison (2006), at 141

<sup>79</sup> Ibid, at 152. On the perceived severity of probation, see also Duff (2003)

<sup>80</sup> Ibid

expectation of rehabilitation or a contribution to crime reduction.<sup>81</sup> It is misleading to claim that a CRO is generally less severe than a CPO since most CROs involve fewer contact hours than most CPOs, as the severity of a CRO cannot solely be linked to the number of contact hours. To do so fails to take into consideration other restrictions and burdens placed on probationers such as disclosure of private matters to the supervising officer, and the duration of the order.<sup>82</sup>

### 2.2.3 Proportionality and Young Offenders

Most of the writings on proportionality have focused on the position with adult offenders. More recently, there has been some attempt to explore how the principle might, and ought to, relate to young offenders. There appears to be no justification for excluding young offenders from a desert-based sentencing regime, although the principal aim of the youth justice system is the prevention of crime.<sup>83</sup> Although it might be desirable to deflect young offenders away from a life of crime, retributivists would argue this does not mean that the young offender should face a disproportionately severe (or lenient) penalty in order to do so. What matters is that the offender is sentenced on the basis of what he himself has done, regardless of age,<sup>84</sup> although the sanction most likely to be effective in steering the offender toward a law-abiding future might then be selected from the pool of proportionate sentencing options. The young offender should not face sentencing under an entirely different regime purely on the ground of his age.

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<sup>81</sup> See von Hirsch, Wasik & Greene (1989), at 611-612 where it was argued that rather than being regarded as rehabilitative, community service should more plausibly be regarded as a punishment; "a sanction that deprives a person of leisure, and exacts unpaid labour, in a community setting."

<sup>82</sup> Rex (1997), summarised in Bottoms (1998), at 72-75

<sup>83</sup> Section 142A CJA 2003, inserted by section 9 of the Criminal Justice and Immigration Act 2008. The principal aim originates from section 37 of the Crime and Disorder Act 1998.

<sup>84</sup> Although age may be a mitigating factor.

The available literature on the topic suggests that if young offenders were to be sentenced under a desert-based framework similar to that of adult offenders, some modifications to the proportionality scheme would have to be made to take into consideration the young offenders' age. Von Hirsch has recognised three reasons for doing so based on (i) juveniles having reduced culpability; (ii) criminal sanctions bearing a greater punitive bite upon young offenders, and (iii) the concept of adolescence being a 'time of testing'.<sup>85</sup> Only a very brief overview of each can be given here.

#### 2.2.3.1 Reduced Culpability<sup>86</sup>

The notion that the young offender is in some way less culpable than his adult counterpart may rest on either of two premises. Firstly, that young offenders "have not acquired the capacity to realise as fully as adults the consequences of their actions."<sup>87</sup> The argument does not purport to suggest that the young offender is unaware that his criminal activity is wrong, but rather he cannot be expected to fully appreciate the harm caused by his doing. Von Hirsch gives the example of domestic burglary:

"While the 15-year-old house burglar may be quite aware that he has entered his victim's flat illegally and is stealing his television set, he may well have less grasp of how his presence affronts that victim's legitimate sense of the dwelling as personal space, and of how his entry might make that person feel vulnerable and insecure."<sup>88</sup>

Secondly, a young person is less able to exercise self-control and resist peer pressure, attributes we might develop through time. Consequently, the young offender is less culpable because he has had less opportunity to develop impulse control.<sup>89</sup>

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<sup>85</sup> von Hirsch (2001) at 223

<sup>86</sup> There is some evidence to suggest that sentencers (at least in the USA) treat adolescent offenders as less culpable for their crimes than adults due to their youthfulness. See Kupchik (2004).

<sup>87</sup> Ball, McCormac & Stone (1995) page 155, quoted by von Hirsch (2001), at 224

<sup>88</sup> von Hirsch (2001), at 224

<sup>89</sup> Ibid, at 226

### 2.2.3.2 Punitive bite

A second line of argument claims that the seriousness of the offence, in terms of harm and culpability, may not be reduced, but that punishments are more onerous when meted out to young offenders. Zedner has noted that the deprivations of incarceration and the stigma suffered upon release might have greater adverse effect on a young person during his formative period of development.<sup>90</sup> Von Hirsch observes that impacting on a young person's needs for a nurturing atmosphere, adequate learning opportunities, exposure to role models and chances to make ties with friends, makes a punishment more onerous upon the young person than it would be on an adult.<sup>91</sup>

### 2.2.3.3 Tolerance towards adolescence as a 'time of testing'

The third basis for imposing lighter punishments on the young provides a sentence discount for juveniles. This approach, favoured by von Hirsch, hinges on youth as being a time for experimentation. A young person should benefit from a discounted sentence because, when a young offender makes his own decision, it may well be the wrong one. Some sympathy should be extended towards the youth in light of this.<sup>92</sup>

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<sup>90</sup> Zedner (1998) at 173

<sup>91</sup> von Hirsch (2001), at 228

<sup>92</sup> von Hirsch (2001), at 229-230

## 2.3 Proportionality in England and Wales

### 2.3.1 Proportionality and the Criminal Justice Act 1991

The Criminal Justice Act 1991 was the first legislative attempt to provide a more principled approach to sentencing. Before this, sentencers enjoyed a wide discretion, not least when determining the purposes of sentencing to be applied.<sup>93</sup> Although the Act did not use the terms 'desert' or 'proportionality', it did identify with the proportionality theory by referring to 'commensurability' and the need for the 'seriousness of the offence' to determine sentence.<sup>94</sup> Other than for serious crimes of a violent or sexual nature from which the public needs protection,<sup>95</sup> the 1991 Act required courts to impose sentences based on the seriousness of an offence.

The 1991 Act effectively produced a sentence hierarchy based on type of penalty, with courts having to pass a threshold before moving a case from one penalty type up to the next.<sup>96</sup> At the top of the hierarchy were custodial sentences, which could only be imposed if the offence "was so serious that only such a sentence [could] be justified for the offence."<sup>97</sup> The use of the word 'only' suggests that the use of custody was to be limited to cases where no other sentence was appropriate, thereby placing custody above all other penalties on the hierarchy. Similarly, the court had to consider the seriousness of the offending when determining the length of any custodial sentence. Except where the offence was of a violent

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<sup>93</sup> See *Sargeant* (1974) 60 Cr App R 74. However, Thomas, (1992), claims that the principle of desert was already a major player in the determination of sentence within the common law. The 1991 Act merely translated the established common law principles into legislation. At page 232

<sup>94</sup> Ashworth (1992b), at 759

<sup>95</sup> Section 2(2)(b) CJA 1991. Also see von Hirsch & Ashworth (1996); Clarkson (1997); Dingwall (1998).

<sup>96</sup> A. Ashworth (1992a), at 242

<sup>97</sup> Section 1(2)(a) CJA 1991, subsequently replicated in section 79(2)(a) PCCSA 2000.



or sexual nature from which it was necessary to protect the public,<sup>98</sup> the term of any custodial sentence was required to be “commensurate with the seriousness of the offence.”<sup>99</sup> The problem of the custody threshold was that the Act offered no guidance to the courts as to how offence seriousness should be construed. If seriousness is a composite of harm and culpability, as von Hirsch has claimed, the Act made no reference to this. This led the courts in some cases to impose custody due to the local prevalence of offending of that sort,<sup>100</sup> or to consider what the right-thinking members of the public would deem to be offences whose seriousness justified custody.<sup>101</sup> Ashworth and von Hirsch criticised both of these approaches as being insufficiently principled, and called for seriousness to be determined by reference to notions of harm and culpability.<sup>102</sup>

Below custody sat community sentences on the sentence hierarchy. Section 6(1) of the 1991 Act provided that a community sentence could only be imposed where the court was of the opinion that the offence “was serious enough to warrant such a sentence.”<sup>103</sup> This threshold implies that a community sentence would only be appropriate if the offence was too serious for either a fine or discharge.<sup>104</sup> Section 6(2) required the particular community order imposed to be “the most suitable for the offender”,<sup>105</sup> and more importantly in terms of desert, that the restrictions on liberty imposed by the order “must be commensurate with the seriousness of the offence.”<sup>106</sup> Wasik and von Hirsch suggested that the proper way to reconcile the need for commensurability and suitability was to first determine which community orders would appropriately reflect the seriousness of the offence. The court

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<sup>98</sup> Section 2(2)(b) CJA 1991, subsequently replicated in section 80(2)(b) PCCSA 2000

<sup>99</sup> Section 2(2)(a) CJA 1991, subsequently replicated in section 80(2)(a) PCCSA 2000

<sup>100</sup> *Cunningham* (1993) 14 Cr App R (S) 444

<sup>101</sup> *Cox* (1993) 14 Cr App R (S) 479; *Keogh* (1994) 15 Cr App R (S) 279

<sup>102</sup> Ashworth & von Hirsch (1997)

<sup>103</sup> Subsequently replicated in section 35(1) PCCSA 2000

<sup>104</sup> Ashworth (1992a), at 246

<sup>105</sup> Section 6(2)(a), subsequently replicated in section 35(3)(a) PCCSA 2000

<sup>106</sup> Section 6(2)(b), subsequently replicated in section 35(3)(b) PCCSA 2000

would then be free to select the order most appropriate for the offender.<sup>107</sup> In other words, “desert will actually determine the size of the penalty. Suitability will then dictate its form.”<sup>108</sup> This would safeguard the principles of proportionality as apparently central to the 1991 Act.

In some respects, the defining role of proportionality under the 1991 Act was promptly curtailed. Shortly after the commencement of the Act, the government enacted the Criminal Justice Act 1993, which diluted some of the proportionality principles previously contained in the 1991 Act. Chief amongst these changes was the greater role afforded to previous convictions at the sentencing stage, and the abolition of the unit fine.<sup>109</sup>

### 2.3.2 Proportionality and the Criminal Justice Act 2003

The English sentencing framework has undergone considerable recent change due to the implementation of the Criminal Justice Act 2003. Most of the new provisions in the 2003 Act stem from The Halliday Report<sup>110</sup> and the White Paper *Justice for All*<sup>111</sup>. The provisions within the Act have raised considerable criticism,<sup>112</sup> most notably for its fundamental lack of clarity. Section 142(1) of the Act lists five potentially conflicting purposes of sentencing for which the courts must have regard.<sup>113</sup> It states:

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<sup>107</sup> Wasik & von Hirsch (1988)

<sup>108</sup> Rex (1998), at 383

<sup>109</sup> Both of these issues are considered below at section 2.4.2 and 2.5.3 respectively.

<sup>110</sup> Halliday (2001)

<sup>111</sup> Cm.5563 (2002, HMSO)

<sup>112</sup> Dennis (2002): “[T]his is not so much a framework as a bran tub”; Taylor, Leng & Wasik (2004), at chapter 10.2; von Hirsch & Roberts, (2004), at 642; Ashworth (2004), at 528

<sup>113</sup> These purposes may have been influenced by Halliday, who concluded “the [sentencing] framework needs to address more directly than at present the purposes of crime reduction and reparation, as well as punishment.” Halliday (2001), para 1.71

“Any court dealing with an offender in respect of his offence must have regard to the following purposes of sentencing -

- (a) the punishment of offenders,
- (b) the reduction of crime (including its reduction by deterrence),
- (c) the reform and rehabilitation of offenders,
- (d) the protection of the public, and
- (e) the making of reparation by offenders to persons affected by their offences”

An ideologist may well look upon this list with approbation. But how likely is it that all five purposes can be satisfied by imposing one sentence on an offender? The government have neglected to provide any guidance on which of these aims should take priority. The purposes listed are “self-evidently a recipe for inconsistency of approach.”<sup>114</sup> Sentencers may be willing to applying different purposes in different situations, perhaps depending on the type of offence and offender antecedents,<sup>115</sup> but the framework does not point to such an approach as being desirable or even advisable.

To complicate matters further, whilst adopting various consequentialist aims (crime reduction, rehabilitation of offenders and public protection), the Act also maintains a desire to retain a proportionality framework by making reference to offence seriousness in a number of its provisions. Firstly, when determining the seriousness of the offence, the Act requires the court to “consider the offender’s culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused.”<sup>116</sup> Secondly, the Act retains, albeit with some alterations, both a custody threshold and a community threshold. Section 148(1) provides that “a court must not pass a community sentence on an offender unless it is of the opinion that the offence, or a combination of the offence with one or more associated with it, was serious enough to warrant such a sentence.” To all intents and purposes, this is the same wording as was previously provided

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<sup>114</sup> Ashworth (2004), at 529

<sup>115</sup> See for example *Raper* [2009] EWCA Crim 2380 in which the court expressed the need for public protection pursuant to section 142(1)(d) of the CJA 2003 following a conviction for burglary upon an offender with 26 previous convictions for similar offences, and *McDade; Reynolds* [2010] EWCA Crim 249 in which the court highlighted the need for a deterrent approach (section 142(1)(b)) when sentencing corrupt prison officers who commit prison security offences for personal gain.

<sup>116</sup> Section 143(1) CJA 2003

by section 6(1) of the 1991 Act, the only difference being a change from the word “shall” to “must”. Section 152(2) provides that a custodial sentence can only be passed if the offence “was so serious that neither a fine alone nor a community sentence can be justified for the offence.” This is similar to the earlier custody threshold criteria laid down in s.1(2)(a) of the 1991 Act; the only noteworthy difference being the words “only such a sentence can be justified for the offence” are replaced with “neither a fine alone nor a community sentence can be justified for the offence.” The earlier provisions made custody a last resort, whereas now the courts can impose custody in cases where a fine and a community sentence have been considered, and subsequently rejected.<sup>117</sup> The final reference to principles of proportionality made by the 2003 Act is contained in section 153(2), which requires that where a custodial sentence is imposed, that sentence “must be for the shortest term...that in the opinion of the court is commensurate with the seriousness of the offence...” This latter provision is particularly important. When determining the length of imprisonment, it would seem that the court should not impose an exemplary sentence aimed to deter the offender away from subsequent offending behaviour or to protect the public, even though both of these are listed in section 142(1) as legitimate purposes of sentencing.

The Act’s approach to sentencing in terms of both desert and crime reduction provides for some sentencers to retain desert as the primary sentence determinant, whilst others may relegate desert and focus instead on some of the other purposes of sentencing listed in section 142(1).<sup>118</sup> The problem is compounded by the lack of a primary sentencing aim, or a hierarchy into which these purposes should be placed, thereby enabling sentencers to set their own priorities.<sup>119</sup> The sentence imposed will invariably be influenced by what the court is trying to achieve in an individual case, which may not reflect the same practices in other

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<sup>117</sup> Taylor, Leng & Wasik (2004), at 186

<sup>118</sup> Dingwall (2008), at 401

<sup>119</sup> On the need for a primary sentencing objective, see Bagaric (2001) chapter 2

cases.<sup>120</sup> This opportunity for such divergent practices is unfortunate and can do nothing to encourage consistency in sentencing approach.

In their guidelines on *Overarching Principles*, the Sentencing Guidelines Council focuses almost entirely on the proportionality principle by stating “the sentencer must start by considering the seriousness of the offence.”<sup>121</sup> After quoting the five purposes of sentencing, the Council does not return to the consequentialist aims under s.142, and makes it clear that the requirement for proportionality should underpin all future guidelines it produces. As one commentator concluded:

“By focusing on issues of harm and culpability, the Council has ensured that desert has retained a surprisingly central role after the Criminal Justice Act 2003... There are indications not only that desert is still breathing but that it is in surprisingly good health.”<sup>122</sup>

The 2003 Act has not entirely “jettisoned” desert principles from sentencing,<sup>123</sup> but the Act does require the courts to consider a number of other sentencing purposes which may be difficult to reconcile with desert theory. It appears that proportionality has been retained by the Act, although the role of desert was more clearly established under the 1991 Act.<sup>124</sup>

## 2.4 Previous Convictions

The sentencing role played by previous convictions has received considerable and ongoing academic attention.<sup>125</sup> On the one hand, claims are made that prior offending should be disregarded at the sentencing stage; to do otherwise is to have the effect of punishing an

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<sup>120</sup> Ibid, page 402

<sup>121</sup> Sentencing Guidelines Council (2004a) para 1.3

<sup>122</sup> Dingwall (2008), at 409

<sup>123</sup> Koffman (2006), at 298

<sup>124</sup> von Hirsch & Roberts (2004), at 644-645

<sup>125</sup> For examples, von Hirsch (1981); Fletcher (1982); Bagaric (2000); Wasik (2001b); Roberts (2008a); Roberts & von Hirsch (2010).

offender twice for his prior criminality. On the other hand, it is argued that a first time offender should be sentenced less severely than a repeat offender. This may be based on a number of claims. Intuition may dictate that recidivists<sup>126</sup> should be punished more severely than first time offenders.<sup>127</sup> Utilitarians rely on prior conduct as a predictor of future risk. An offender with a number of previous convictions is more likely to reoffend than a first offender.<sup>128</sup> Harsher punishments should therefore be imposed on a recidivist with the aim of reducing their risk of reoffending through incapacitation, deterrence or rehabilitation.

Nevertheless, the relevance of prior conduct as a determinant at sentencing has been somewhat less straightforward to reconcile with desert theory than with utilitarianism. Desert dictates that the sentence imposed should be proportionate to the seriousness of the offence committed. *Prima facie*, previous criminal history should be irrelevant under a desert framework as it is not immediately relevant to the assessment of offence seriousness.

Broadly there are four approaches to dealing with previous convictions. Firstly, they could be ignored altogether for sentencing purposes, thereby creating a flat-rate system whereby offenders are sentenced without reference to their criminal record. Such an approach could be attractive to some desert theorists as it provides for the sentence to be determined solely on the basis of the offence seriousness.<sup>129</sup> Secondly, previous convictions could be used as a basis for imposing progressively more severe sanctions for each new offence under a cumulative sentencing system, leading to the very real possibility that an offender (particularly a persistent petty offender) would be sentenced principally on his record and

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<sup>126</sup> Here, the term 'recidivist' is used as a synonym of all repeat offenders.

<sup>127</sup> Stuart (1986), at 49

<sup>128</sup> Fletcher (1982), at 55. Statistics issued by the Ministry of Justice indicate a 6.9 percent reoffending rate for adult offenders with no previous convictions, rising to 57.5 percent for adult offenders with ten or more previous convictions. See Ministry of Justice (2010a), Table A4

<sup>129</sup> Bagaric (2000); Bagaric (2001), chapter 10; Fletcher (1978), at 459-466

not in reference to the current offence. A cumulative approach may be attractive to utilitarians but would not be adopted by a purely desert-based sentencing system.

Desert theorists have sought to steer a path between these two extremes by developing a third approach to dealing with previous convictions. This 'progressive loss of mitigation' approach affords a limited role to previous convictions, whereby the first time offender receives a degree of mitigation for his previous good character.<sup>130</sup> For each subsequent lapse, this mitigation is reduced until eventually it is exhausted. Once the offender has accumulated sufficient convictions for the mitigation to be lost, any subsequent convictions would not be aggravating. Effectively, the progressive loss of mitigation approach envisages a sentence ceiling, set in terms of the seriousness of the offence. Once the mitigation for previous good character has been exhausted and this ceiling is reached, no greater punishment can then be imposed which would exceed the ceiling.

Progressive loss is based on notions of lapse and tolerance.<sup>131</sup> Human frailty may lead us to make poor decisions, including criminal decisions, which may be particularly acute in the context of peer pressure and social deprivation.<sup>132</sup> Accordingly, the sentencing system should recognise these aberrations of weakness by offering a sentence discount as limited tolerance of the lapse; "a transgression...is judged less stringently when it occurs against a background of prior compliance."<sup>133</sup> This tolerance reduces with subsequent offending until, eventually, the discount is exhausted. At this point, the offender is no longer able to legitimately claim that these aberrations are uncharacteristic lapses.<sup>134</sup> Therefore, no discount is given from this point onwards. The offender's plea that the act was out of

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<sup>130</sup> Progressive loss of mitigation has its origin in Thomas' 'progressive loss of credit' approach whereby a person was said to accumulate credit for his crime-free life. See Thomas (1970), at 197

<sup>131</sup> von Hirsch & Ashworth (2005), at 151

<sup>132</sup> Ashworth (2010a), at 201

<sup>133</sup> von Hirsch & Ashworth (2005), at 152

<sup>134</sup> *Ibid*, at page 153

keeping with his previous behaviour is most persuasive when he has no previous convictions. The persuasiveness is progressively lost with each subsequent transgression.<sup>135</sup>

The progressive loss of mitigation model avoids the criticism aimed at cumulative models that affording previous conduct a role at the sentencing stage results in an offender being punished twice for his crime. By offering a discount for a first offence, the offender is not being punished again for the earlier crime where that discount is then reduced or removed following reconviction.<sup>136</sup> Rather, he is being sentenced according to the seriousness of his offence, although he can no longer claim that he deserves a scaled down penalty.<sup>137</sup> After a certain number of offences have been accrued, the plea for mitigation is exhausted and the offender would (deservedly) receive the full measure proportionate to his crime.<sup>138</sup> If he continues to offend after this, the penalty should not be increased. Although the discount in mitigation is no longer due, the sentence ceiling for the offence has been reached, and further transgressions by the offender cannot aggravate the deserved sentence beyond this ceiling. To do otherwise would undermine principles of proportionality:

“Were it permissible to keep increasing the response with each subsequent repetition, even minor offences could eventually receive very severe punishments with a sufficient number of repetitions.”<sup>139</sup>

More recently, an alternative approach – a recidivist premium – has been reintroduced by Julian Roberts which, in keeping with the progressive loss of mitigation principle, aims to deal with previous convictions within the confines of desert theory.<sup>140</sup> Unlike progressive loss, this theory does not work on the notion of mitigation for a first time offender, but rather it connotes a ‘recidivist premium’ for repeat offenders whereby greater punishment should be imposed on repeat offenders to reflect their enhanced culpability. The net effect of

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<sup>135</sup> von Hirsch (1981), at 597

<sup>136</sup> von Hirsch & Ashworth (2005), at 148

<sup>137</sup> von Hirsch (1981), at 598

<sup>138</sup> Ibid, at 616

<sup>139</sup> von Hirsch (1985), at 88

<sup>140</sup> The theory of a recidivist premium was originally put forward by G. P. Fletcher (1982)



this premium is the same as with progressive loss: the repeat offender is subject to greater punishment than the first-time offender. The difference lies in how the sentence is reached. In progressive loss, the first offender receives a discount from the prescribed sentence. A repeat offender (who has exhausted this source of mitigation) would receive the prescribed sentence. Under a recidivist premium model, the first offender would receive the prescribed sentence, whereas the repeat offender would receive an inflated punishment greater than that which is ordinarily prescribed for the offence. The principle behind progressive loss is not that a repeat offender deserves to be punished again for his earlier crime, but rather that he deserves the full measure of blame for his current offence.<sup>141</sup> The sentence ultimately imposed is determined by the seriousness of the instant offence, and not on the prior conduct, which only affects the level of discount deserved (if any).<sup>142</sup>

Two problems with the progressive loss of mitigation approach have never been adequately dealt with. Firstly, how great a discount should be offered for the first offence? Von Hirsch has offered nothing more concrete than to suggest that a “modest discount” should be granted.<sup>143</sup> Owing to the fact that the seriousness of the offence should be the principal sentence determinant, a discount of 50 percent would give too much weight to the offender’s character. The discount granted should be sufficient to substantiate the mitigation owed to a first time offender without breaching the confines of proportionality by substantially reducing the role of offence seriousness. A discount of around 20 percent of the prescribed sentence may be sufficient to comply with principles of desert whilst also offering a discount appropriately reflecting the offender’s clean record. Doing so would maintain the central function of offence seriousness in determining sentence.

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<sup>141</sup> von Hirsch (1981), at 598

<sup>142</sup> For a critique of the recidivist premium and progressive loss of mitigation, see Roberts (2009), and A. von Hirsch (2009)

<sup>143</sup> von Hirsch & Ashworth (2005), at 149

The second (and somewhat related) problem not previously dealt with concerns the question of the rate of progressive loss: after how many convictions should the discount be exhausted? Von Hirsch has suggested that the discount may be lost after a fourth or fifth offence, although no reasoning is offered as to why.<sup>144</sup> Similarly, Martin Wasik proposed the discount would be exhausted after five convictions.<sup>145</sup> Subsequently, von Hirsch and Ashworth claim that this is a matter of judgement: “a possibility would be that the discount should be lost after about three prior convictions, but there are no magic numbers.”<sup>146</sup> The point at which the discount is exhausted should coincide with the moment when the offender can no longer convincingly suggest that his conduct was uncharacteristic. A fourth conviction (i.e. where the offender has amassed three prior convictions) may be the point at which this persuasiveness is lost.

#### 2.4.1 Previous Convictions and the Criminal Justice Act 1991

Prior to the enactment of the Criminal Justice Act 1991, the progressive loss of mitigation approach to previous convictions had received support within the common law. The Court of Appeal in *Queen*<sup>147</sup> had ruled that:

“The proper way to look at the matter is to decide on a sentence which is appropriate for the offence for which the person is before the court. Then in deciding whether that sentence should be imposed or whether the court can properly extend some leniency to the offender, the court must have regard to those matters which tell in his favour; and equally to those which tell against him, in particular his record of previous convictions.”<sup>148</sup>

The Court’s reference to the potential to extend leniency and the reference to previous convictions seemingly suggested that a lack of previous convictions would be a factor to

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<sup>144</sup> Ibid.

<sup>145</sup> Wasik (1987), at 118

<sup>146</sup> von Hirsch & Ashworth(2005), at page 155. Elsewhere Ashworth has suggested that “the third offence may be fully censured.” Ashworth (2010a), at 202.

<sup>147</sup> (1981) 3 Cr App R (S) 245

<sup>148</sup> Per Kenneth Jones, J. at 255

consider in extending some leniency toward the offender. The presence of previous convictions, on the other hand, might lead the court to conclude that no such leniency should be extended. This was followed by the 1990 White Paper, which also appeared to embrace the principle of progressive loss by making reference to the decision in *Queen*.<sup>149</sup>

Under the 1991 Act, the seriousness of the offence was of paramount importance in determining the appropriate sentence. Section 29(1) of the Act provided that, “an offence shall not be regarded as more serious...by reason of any previous convictions of the offender or any failure of his to respond to previous sentences”, and section 28 permitted the court to have regard to any mitigating factors, which may have been intended to include a clean prior record. Combined, the two sections appeared to offer additional approval of a progressive loss of mitigation approach. The Court of Appeal in *Bexley*<sup>150</sup> confirmed that section 29(1) “embodies the principle...that an offender who has been punished for offences in the past should not in effect be punished for them again when being sentenced for a fresh offence”,<sup>151</sup> although this was of course the legislative intention.

Section 29(1) led to some unrest within the judiciary and magistracy who claimed the section prevented them from taking into account an offender’s criminal record.<sup>152</sup> Ultimately the government repealed section 29 and replaced it with a new provision, inserted by section 66(6) of the Criminal Justice Act 1993:

“In considering the seriousness of any offence, the court may take into account any previous convictions of the offender or any failure of his to respond to previous sentences.”

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<sup>149</sup> Home Office (1990) para 2.18

<sup>150</sup> (1993) 14 Cr App R (S) 462

<sup>151</sup> Per Taylor LCJ, at 465

<sup>152</sup> Ashworth (2000), at 170

The proportionality constraints contained elsewhere in the 1991 Act remained, requiring the court to principally determine sentence on the basis of offence seriousness.<sup>153</sup> Wasik and von Hirsch have argued that the new section 29 should not be viewed as having conferred a wide discretion upon sentencers to aggravate the sentence on the basis of previous convictions, as this would be impossible to reconcile with other key provisions contained within the 1991 Act.<sup>154</sup> Following the enactment of the new section 29, some Court of Appeal authorities pointed to the courts' use of previous convictions as a source of aggravation, having little regard for a sentence ceiling set to reflect offence seriousness. In *Spencer & Carby*,<sup>155</sup> the Court ruled that "without doubt the offences for which [the offenders] were being dealt with could properly be viewed as more serious by reason of their appallingly long records".<sup>156</sup>

#### 2.4.2 Previous Convictions and the Criminal Justice Act 2003

Following a Home Office announcement of considered changes to sentencing policy placing greater emphasis on offenders' previous record,<sup>157</sup> the Halliday Report proposed that sentence severity should reflect the seriousness of the offence as well as the offender's relevant criminal history.<sup>158</sup> Halliday based the need to extend the recidivist premium by affording previous convictions a more central role in the sentencing decision on two main rationales: firstly, that repeat offenders somehow deserve greater punishment, and secondly,

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<sup>153</sup> That a custodial sentence could only be imposed if the offence was "so serious" that only custody could be justified (section 1(2)(a) CJA 1991), that the length of a term of imprisonment must be commensurate with the seriousness of the offence (section 2(2)(a)), a community sentence could only be imposed if the offence was "serious enough" to justify such a sentence (section 6(1)), and the restrictions placed on the offender were to be commensurate with the seriousness of the offence (section 6(2)(b)).

<sup>154</sup> Wasik & von Hirsch (1994), at 412

<sup>155</sup> (1995) 16 Cr App R (S) 482

<sup>156</sup> Per McCowan LJ, at 485-486

<sup>157</sup> Home Office (2001) para 2.76

<sup>158</sup> Halliday (2001), chapter 2

affording previous convictions a more central role in the sentencing decision would provide greater scope for efforts to reform criminals.<sup>159</sup> Neither of these claims was sufficient to convince von Hirsch that it was necessary, or desirable, to place greater emphasis on previous convictions.<sup>160</sup> Nonetheless, the CJA 2003 enacted an enhanced role for previous convictions by generating a “step function, with severity increments accruing with every previous conviction” providing it was relevant and sufficiently recent.<sup>161</sup> According to section 143(2) of the Criminal Justice Act 2003, the court must treat each previous conviction as an aggravating factor if the court believes that the prior history can reasonably be so treated, having regard to the nature of the offence and the time lapsed since conviction.

This move was likely to deflect the sentencing system away from the progressive loss of mitigation approach which had been previously adopted and appears to have enacted a cumulative approach by reference to the term “each previous conviction”. The 2003 Act retains thresholds for custodial and community sentences based on the seriousness of the offence. By increasing the role of previous convictions, the Act created further tension between retributivist and utilitarian sentencing objectives.<sup>162</sup> By affording previous history a role as an aggravating factor, the 2003 Act implies that the seriousness of an offence is increased where the offender has a criminal record and this increased seriousness justifies more severe punishment, although the Act does not explain why an offender’s culpability is enhanced by reoffending. One view is that where an offender is reconvicted, culpability could be enhanced by his defiance of the law, although Roberts claims that a new conviction may not constitute legal defiance, but rather “a violation of a naive judicial expectation that

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<sup>159</sup> Ibid, para 2.7

<sup>160</sup> von Hirsch (2002)

<sup>161</sup> von Hirsch & Roberts (2004)

<sup>162</sup> Roberts (2008a), at 469

punishment should result in desistence.”<sup>163</sup> It is certainly not clear why reoffending, although presenting a disappointment to the court, would increase an offender’s culpability.

The 2003 Act places a reasonableness test on the use of an offender’s prior history at the sentencing stage: previous convictions should only be aggravating if the court views them as relevant and recent. The Sentencing Commission Working Group, established in 2007 to examine the feasibility of creating a Sentencing Commission to replace the SGC and SAP, found discrepancies amongst the meaning of ‘relevant’. Some appear to consider previous convictions as relevant only if they are of exactly the same nature as the current offence. For an offender sentenced for theft, only previous theft convictions would be considered. Others however viewed as relevant those convictions of broadly the same nature as the current offence.<sup>164</sup> Consequently, previous convictions for a raft of other dishonesty offences may be taken into consideration when sentencing for theft. Julian Roberts’ interviews with offenders found a consensus view that ‘specialists’ should be dealt with more severely than those who offend across the whole catalogue of the criminal law, although no explanation for this view was given.<sup>165</sup> Some interviewees had, however, noted that similar previous convictions tell something about the offender’s need which should be taken into consideration by the sentencing court.<sup>166</sup> But this is not to say that specialists deserve greater punishment. Rather, the court should look at the criminal cause when determining the type of sentence, but not the amount of punishment. Ashworth raises a question of whether specialisation is necessarily worse than versatility.<sup>167</sup> Specialisation may signify an offending pattern behind which lies a character trait (e.g. poverty or drug addiction for habitual acquisitive criminals) which the court may want to take into account when sentencing by considering a

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<sup>163</sup> Ibid, at page 470. See also Fletcher (1982), at 57: “I would argue that, in a liberal society, defiance should not constitute a wrong that justifiably enhances the punishment a recidivist deserves.”

<sup>164</sup> Sentencing Commission Working Group (2007), page 11

<sup>165</sup> Roberts (2008) pages 154

<sup>166</sup> Ibid, page 152

<sup>167</sup> Ashworth (2010a), page 211

rehabilitative penalty. But such behaviour is not necessarily worse than offending across the spectrum of the criminal law. Indeed, versatility may be worse than specialisation: the versatile offender may be inherently 'bad' rather than offending out of 'need', and there may be little chance of curbing his offending behaviour.

Prior to the commencement of the Criminal Justice Act 2003, numerous commentators had questioned the role of similarity between the current offence and the previous conviction(s). Wasik claimed that similarity between offences ought to be relevant because "it confirms in the starkest possible manner that such misbehaviour is characteristic of the [offender]." <sup>168</sup> Similarly, Julian Roberts asserted that if a prior conviction is of a dissimilar nature to the current offence, its effect on sentencing should be "heavily discounted". <sup>169</sup> Von Hirsch, on the other hand, gives similarity such a wide meaning so as to render it largely irrelevant:

"...the acts of force, theft and fraud that make up the bulk of the criminal law are all intentional violations of the manifest rights of others. When punishing a person for one such intentional, victimising crime, it thus seems appropriate to consider previous intentional victimising crimes, even if the technique was different. When someone is convicted of white-collar swindle, for example, it would be appropriate to consider prior convictions involving not only other frauds but also outright thefts and acts of force, as these acts involve wilful injury." <sup>170</sup>

It is unlikely that the 2003 Act was enacted with the intention of taking too narrow a view of similarity and relevance. As Ashworth claims, it would be absurd to suggest that placing too great an emphasis on similarity would "imply that everyone is entitled to one discounted crime of violence, one discounted fraud, one discounted sexual offence and so on." <sup>171</sup> The Halliday Report had noted that most persistent offenders have a criminal record including a variety of offences and so "less weight should be given to whether previous and current

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<sup>168</sup> Wasik (1987), at page 119

<sup>169</sup> Roberts (1994), at 27

<sup>170</sup> von Hirsch (1981) at 616-617

<sup>171</sup> A. Ashworth(2010a), at page 212

offences are in the same category.”<sup>172</sup> Rather, “the key point is whether the previous offences justify a more severe view” being taken.<sup>173</sup>

By enacting a cumulative approach to previous convictions, the 2003 Act fails to have proper regard to the Council of Europe’s Recommendation on sentencing consistency, which states:

“Previous convictions should not, at any stage in the criminal justice system, be used mechanically as a factor working against the defendant. Although it may be justifiable to take account of the offender’s previous criminal record within the declared rationales for sentencing, the sentence should be kept in proportion to the seriousness of the current offence(s).”<sup>174</sup>

Whilst the then Criminal Justice Bill was passing through Parliament, statements had been made to avow that the new provision would “not mean wildly disproportionate sentences, because the sentences will operate within the principle, which is established later in the [Act], that the severity of the resulting sentence should reflect the seriousness of the current offence... The clause modifies the proportionality principle that previous relevant offences can act as an aggravating factor.”<sup>175</sup> Although section 143(2) discloses no such constraint,<sup>176</sup> it appears that parliamentary intention was that courts would apply section 143(2) within confines set by other provisions reflecting the need to uphold principles of proportionality.

## 2.5 Sentence Types

Discussion now turns to the types of penalty the courts have at their disposal when sentencing for theft.<sup>177</sup> To reflect the sentencing hierarchy under the 1991 and 2003 Criminal

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<sup>172</sup> Halliday (2001) at para 2.17

<sup>173</sup> Ibid

<sup>174</sup> Council of Europe (1992), para D1-D2

<sup>175</sup> Hilary Benn, House of Commons Standing Committee B, 30<sup>th</sup> January 2003, Column 748

<sup>176</sup> Ashworth (2010a), at 213

<sup>177</sup> Some penalties were only available under the 1991 regime and have since been superseded by new sentences within the 2003 Act. Consequently, they are no longer available to the courts as sentence options and are referred to here in the past tense.



Justice Acts, penalties are categorised within four bands: custodial sentences, community sentences, financial penalties, and discharges.

## 2.5.1 Custodial Sentences

### 2.5.1.1 Immediate Imprisonment

Since the abolition of the death penalty, imprisonment has been the ultimate sanction in England and Wales. By its very nature, it imposes a greater deprivation on liberty than any other available sanction. Inmates have various elements of their lives affected and controlled by incarceration, which would not be so controlled by any non-custodial option. Limitations on physical movement, activity, education, association with others, separation from family, friends and the community are just some of the deprivations imposed.<sup>178</sup> These deprivations, along with the economic costs of imprisonment, have led the English legislature to limit the use of imprisonment to occasions where the offence committed is so serious that only custody can be justified.<sup>179</sup>

The legislative limitations placed on the use of imprisonment have been discussed elsewhere.<sup>180</sup> Suffice to say here, the legislature in England has sought to limit the use of imprisonment primarily to offences which are so serious that only custody can be

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<sup>178</sup> See for example, Reuss (2003)

<sup>179</sup> Section 1(2)(a) CJA 1991, superseded by section 152(2) CJA 2003

<sup>180</sup> See section 2.3 above

justified.<sup>181</sup> Moreover, where a custodial sentence is imposed, its length must be commensurate to the seriousness of the offence.<sup>182</sup>

Prison has been criticised as a paradoxical form of crime control. On the one hand, it produces certain incapacitative benefits by safeguarding society against further offending by the offender. At the same time, it is inherently likely to cause damage to the offender which, upon his release, may turn him to further crime.<sup>183</sup>

#### 2.5.1.2 Detention and Training Order

The detention and training order (DTO) is the standard custodial sentence for young offenders aged 10-17. As a custodial sentence, the seriousness of the offence must satisfy the custody threshold before the court may impose a DTO. The provisions surrounding the DTO highlight the welfarist approach to youth justice, and the desirability of avoiding placing young offenders in custody. Where the offender is aged under 15, the court may only impose a DTO if the offender is a 'persistent offender',<sup>184</sup> a term which is not defined by the Act.<sup>185</sup> If the offender is aged under 12, the court must be satisfied that "only a custodial sentence would be adequate to protect the public from further offending by him."<sup>186</sup> The order may run only for lengths as specified in section 101 of the PCCSA 2000, namely 4, 6, 8,

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<sup>181</sup> Similar sentiments have been echoed since at least the 1970s. The Radical Alternatives to Prison Group was founded with the aim to wholly abolish imprisonment for all but the most violently dangerous offenders; Radical Alternatives to Prison (1970), paragraph 1. See also, Howard League of Penal Reform (1979).

<sup>182</sup> Section 2(2)(a) CJA 1991 and section 153(2) CJA 2003

<sup>183</sup> Dunbar & Langdon (1998), page 32

<sup>184</sup> Section 100(2)(a) PCCSA 2000

<sup>185</sup> Elsewhere, a persistent young offender is defined as "a young person who is aged 10 to 17...who has been sentenced guilty of offences by any criminal court in the United Kingdom on three or more separate occasions in the past for one or more recordable offences on each of the occasions, and within three years of the last sentencing occasion is subsequently arrested and then found guilty of at least one more recordable offence." Ministry of Justice (2008), at 12

<sup>186</sup> Section 100(2)(b)

10, 12, 18 or 24 months. Only half of the length of the order is spent in custody. For the remainder of the order, the offender is placed under supervision.

### 2.5.1.3 Suspended Sentences of Imprisonment

The suspended sentence is a custodial sentence even though, as Wasik describes, it only *potentially* leads to the offender being admitted into custody.<sup>187</sup> Upon deciding to suspend a custodial sentence, no doubt the courts hope to spare the offender from being incarcerated as he “will be deterred from further offending by the knowledge that he is subject to the suspended sentence.”<sup>188</sup>

Under the Criminal Justice Act 1991, as consolidated under the PCCSA 2000, a court could suspend a sentence of not more than two years’ imprisonment,<sup>189</sup> provided that a term of immediate imprisonment would have been imposed were it not for the power to suspend,<sup>190</sup> and that the suspension could be “justified by the exceptional circumstances of the case.”<sup>191</sup> Judicial guidance appeared to strictly interpret the meaning of “exceptional circumstances”. *Okinikan*<sup>192</sup> ruled that an offender’s age, previous good character or early guilty plea are common features and are thus not exceptional. In his review of the decision to suspend sentences of imprisonment, Nigel Stone examined 33 cases in one county where the sentence was imposed in the first operational year of the 1991 Act (October 1992-September 1993).<sup>193</sup>

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<sup>187</sup> Wasik (2001a) at page 157

<sup>188</sup> Ibid.

<sup>189</sup> Section 118(1) PCCSA 2000

<sup>190</sup> Section 118(4)(a)

<sup>191</sup> Section 118(4)(b)

<sup>192</sup> (1993) 41 Cr App R (S) 453

<sup>193</sup> Stone (1994)

In some cases within his sample, there appeared to be no exceptional factors which would have justified the suspension of a prison sentence.<sup>194</sup>

The operational period of the suspension was limited to not less than one and not more than two years.<sup>195</sup> A suspended sentence could be breached where an offender was convicted of an imprisonable offence during the operational period of the sentence. According to section 119(1) of the PCCSA 2000, the courts had four options when dealing with a breach: (a) to order that the suspended sentence be activated in full, (b) to activate part of the sentence, (c) to extend the operational period of the suspended sentence by up to two years, or (d) to take no action. There was an expectation, which accorded with the purpose of a suspended sentence, that the court should activate the sentence in full unless it was “of the opinion that it would be unjust to do so in view of all the circumstances”.<sup>196</sup>

The problem under the 1991 Act was that the notion of a suspended sentence of imprisonment does not sit well within a desert-based sentencing framework.<sup>197</sup> It may be difficult to imagine a large number of cases where custody is justified in accordance with the threshold test of section 79(2)(a) of the PCCSA 2000<sup>198</sup>, but where the offender does not need to serve a prison sentence and, furthermore, does not require any real punishment. Where an offender complies with the conditions of the suspended sentence, under the 1991 Act regime, he would suffer no deprivation or other consequence to his offending other than the marking of a conviction on his criminal record. Consequently, the suspended sentence under the 1991 Act more closely resembled a conditional discharge than an immediate custodial sentence. Certainly in the early days of the suspended sentence, there was a

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<sup>194</sup> Ibid, at page 406

<sup>195</sup> Section 118(2)

<sup>196</sup> Section 119(2) PCCSA 2000. This replicates previous practices: “It cannot be made too plain that when suspended sentences of imprisonment are imposed they mean what they say. Only in exceptional circumstances...will those suspended sentences not be activated.” See *Craine* (1981) 3 Cr App R (S) 198, at 200 per Russell J.

<sup>197</sup> See von Hirsch, Wasik & Greene (1989), at 615

<sup>198</sup> And subsequently section 152(2) CJA 2003

tendency of the courts to use the sentence as a non-custodial option, rather than as a custodial sentence as it was, and remains, intended.<sup>199</sup>

Whereas under the 1991 Act sentences of imprisonment could only be suspended in “exceptional circumstances”, the enactment of the 2003 Criminal Justice Act has provided the courts with a power to suspend any custodial sentence of between 14 days and 12 months. During the suspension period, which must run for between six months and two years, the offender must be ordered to comply with one or more of the requirements listed in section 190 of the Act, which are the same requirements as may form a community sentence.<sup>200</sup> Whereas under the 1991 Act a suspended sentence could only be breached by the offender committing a further offence during the operational period, the addition of these requirements gives rise to a second potential ground for breach: the failure to comply with one or more of the attached requirements.<sup>201</sup> The imposition of these requirements means that a suspended sentence may no longer be viewed as a “let-off”, synonymous with a discharge. It might however now more closely resemble a community sentence. Therefore, the long-standing view held by sentencers that the suspended sentence is a non-custodial sentence may have been compounded by the obligation to impose additional community requirements, which may act to draw closer similarities between the suspended sentence and the community sentence.

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<sup>199</sup> Bottoms (1981), at 15

<sup>200</sup> Namely (a) an unpaid work requirement, (b) an activity requirement, (c) a programme requirement, (d) a prohibited activity requirement, (e) a curfew requirement, (f) an exclusion requirement, (g) a residence requirement, (h) a mental health treatment requirement, (i) a drug rehabilitation requirement, (j) an alcohol treatment requirement, (k) a supervision requirement, and (l) an attendance centre requirement.

<sup>201</sup> Although compliance with these requirements is also a relevant factor for the court to consider when deciding whether to activate the suspended sentence upon commission of a further offence: *R v Zeca* [2009] EWCA Crim 133

## 2.5.2 Sentences within the Community

Both the 1991 and 2003 Criminal Justice Acts created a sentence hierarchy based on penalty type. According to both Acts, community-based sentences are less severe than custodial sentences, but more punitive than fines and discharges. The diverse range of community-based sentencing options available to the courts under the 1991 Act were not necessarily of comparable severity; a criticism raised by the Halliday Report.<sup>202</sup>

### 2.5.2.1 Community Punishment Order

A community punishment order (CPO)<sup>203</sup> is available to all criminal courts when dealing with an offender, aged 16 or over, who has been convicted of an imprisonable offence. The order requires the offender to perform unpaid work within the community for between 40 and 240 hours as specified by the order.<sup>204</sup> The number of hours of unpaid work required should reflect the seriousness of the offence. The court must be satisfied that the offender is suitably fit to undertake the work,<sup>205</sup> and that appropriate work is available locally.<sup>206</sup> It has been said that the attraction of a CPO rests on the fact that the offender is genuinely punished by the loss of his leisure time whilst performing unpaid work, whilst at the same time, the work can be constructive and rewarding if the offender cooperates.<sup>207</sup>

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<sup>202</sup> Halliday (2001), para 6.4

<sup>203</sup> Previously community service order, the name was changed to community punishment order under section 44 of the Criminal Justice and Courts Services Act 2000

<sup>204</sup> Section 46(3) PCCSA 2000

<sup>205</sup> Section 46(4)

<sup>206</sup> Section 46(6)

<sup>207</sup> Sprack (2004), page 457

### 2.5.2.2 Community Rehabilitation Order

A community rehabilitation order (CRO)<sup>208</sup> could be imposed by any court when sentencing an offender aged over 16. Whilst subject to the order, the offender was required to accept the supervision and keep in regular contact with a probation officer. The order could last for between six months and three years. Wasik claims that the criteria for fixing the length of the order is unclear, but is presumably based on the seriousness of the offence and the offender's needs.<sup>209</sup> According to section 41(1) of the PCCSA, the purposes of the CRO were to rehabilitate the offender whilst also protecting the public from harm or preventing the offender from committing further offences.

### 2.5.2.3 Community Punishment and Rehabilitation Order

As its name suggests, the community punishment and rehabilitation order (CPRO) was a combination of a CPO and CRO.<sup>210</sup> The courts could only impose a CPRO if the offender was aged 16 or over and had committed an imprisonable offence,<sup>211</sup> and the court was satisfied that the offence was serious enough to comply with the community sentence threshold contained in section 35(1) of the PCCSA 2000. The supervision element of the CPRO was dealt with in the same manner as if the offender had been subject to a CRO, and the unpaid work was dealt with in the same way had the offender been subject to a CPO.<sup>212</sup> The period of supervision was specified in the order and had to run for between one and

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<sup>208</sup> Previously a probation order, the name was changed to community rehabilitation order under section 43 of the Criminal Justice and Courts Services Act 2000

<sup>209</sup> Wasik (2001a), at 173

<sup>210</sup> Previously called a combination order, the name was changed to community punishment and rehabilitation order under section 45 of the Criminal Justice and Courts Services Act 2000

<sup>211</sup> Section 51(1) PCCSA 2000

<sup>212</sup> Section 51(4)

three years.<sup>213</sup> The offender could only undertake unpaid work of between 40 and 100 hours,<sup>214</sup> somewhat less than the maximum 240 hours under a CPO. It was envisaged that the CPRO would “be particularly suitable for some persistent property offenders...sentenced for burglary, theft, handling, fraud and forgery.”<sup>215</sup>

#### 2.5.2.4 Curfew Order

Pursuant to section 37 of the PCCSA 2000, the curfew order was available for an offender of any age<sup>216</sup> who has committed an offence for which the sentence is not fixed by law. As a community order, a curfew could only be imposed where the offence was “serious enough to warrant a community sentence” according to the community sentence threshold contained within section 35(1) of the PCCSA 2000. The curfew restricted the offender to remain in a given place for two to twelve hours per day, for a period of up to six months.<sup>217</sup> Where an offender has a propensity to offend at a particular place or time, the curfew could be an appropriate and cost effective way of incapacitating the offender from being capable of reoffending at those places or during those times. In the White Paper *Crime, Justice and Protecting the Public*, which resulted in the Criminal Justice Act 1991, the Government stated that:

“Curfews could be helpful in reducing some forms of crime, thefts of and from cars, pub brawls and other types of disorder. A curfew order could be used to keep people away from particular places...or to keep them at home in the evenings or weekends.”<sup>218</sup>

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<sup>213</sup> Section 51(1)(a)

<sup>214</sup> Section 51(1)(b)

<sup>215</sup> Home Office (1990), para 4.16

<sup>216</sup> An earlier provision restricting the curfew order to offenders aged 16 or over was removed by section 43 of the Crime (Sentences) Act 1997.

<sup>217</sup> Section 37(3) PCCSA 2000

<sup>218</sup> Home Office (1990), para 4.20



#### 2.5.2.5 Action Plan Order

When dealing with a young offender, the court had the power to impose an action plan order (hereafter APO). The Government described the APO as “a short intensive programme of community intervention combining punishment, rehabilitation and reparation to change offending behaviour and prevent further crime.”<sup>219</sup>

As with all other community sentences, the court must be satisfied that the offence is “serious enough to warrant a community sentence.”<sup>220</sup> The court could impose an APO either to rehabilitate the offender or otherwise prevent him from further offending.<sup>221</sup> The order could only last for three months, during which period the offender would be placed under supervision<sup>222</sup> and would be obliged to comply with certain requirements pertaining to his “actions and whereabouts”.<sup>223</sup> The types of requirements which could be included in the order were listed in section 70(1) of the 2000 Act, and included participation with certain activities, exclusion from particular places, and compliance with educational arrangements. The 1997 White Paper had indicated that the requirements contained within each order would be tailored to suit the individual offender to address the specific causes of offending.<sup>224</sup>

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<sup>219</sup> Home Office (1997) para 5.18

<sup>220</sup> Section 35(1) PCCSA 2000

<sup>221</sup> Section 69(3) PCCSA 2000

<sup>222</sup> Section 69(1)(b) PCCSA 2000

<sup>223</sup> Section 69(1)(a) PCCSA 2000

<sup>224</sup> Home Office (1997) para 5.19

#### 2.5.2.6 Supervision Order

The supervision order was the youth justice equivalent of the CRO. Introduced by section 12 of the Children and Young Persons Act 1969, a supervision order may be imposed on an offender aged 10–17 for a period of up to three years. The aim of the order is to reduce reoffending, reform and protect the public.

#### 2.5.2.7 Referral Order

The referral order is the mandatory disposal for 10-17 year olds who plead guilty at their first prosecution, providing that the court is not proposing to impose either custody<sup>225</sup> or an absolute discharge.<sup>226</sup> The intention of the order is to remove the courts discretion to ‘punish’ the offender for his first offence, provided that he enters a guilty plea and the offence is not so serious to warrant custody.<sup>227</sup> The legislation is silent as to *when* the guilty plea must be entered. There appears therefore to be no requirement for the offender to admit guilt at an early stage. Under the order, the offender is referred to a youth offending panel for 3-12 months. The panel is charged with formulating a contract with the offender concerning his behaviour. Once complete, the conviction becomes spent so the offender does not face the ongoing burden of carrying a criminal record.

A number of problems have arisen in respect of the referral order, two of which will be briefly outlined here. Firstly, the order offers an incentive for an offender to plead guilty.

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<sup>225</sup> Section 16(1)(b) PCCSA 2000

<sup>226</sup> Section 16(1)(c) PCCSA 2000

<sup>227</sup> Easton & Piper (2008), page 424

Knowing what the outcome will be and, more importantly, not being burdened by a criminal record, reduces the stigma attached to being branded a criminal and gives the offender a chance of a fresh start. But by doing so, the system is “speeding up the criminal process by inducing guilty pleas by the promise of a rapid return to a clean record.”<sup>228</sup> Secondly, where the offender pleads guilty, the minimum penalty (unless the offence is sufficiently trivial to justify an absolute discharge) is a three month referral order. Where the offender pleads not guilty, the court could impose a small fine or a conditional discharge for the same offence. If an offender then reoffends, the referral order is not available so the courts may impose a lesser penalty of a fine or conditional discharge. In short, the minimum penalty appropriate following a guilty plea may be higher on the tariff than the minimum available for a not guilty plea.<sup>229</sup>

#### 2.5.2.8 Reparation Order

When dealing with a young offender, section 73 of the PCCSA 2000 provided the courts with a power to impose upon the offender a reparation order, requiring the offender to make reparation to the victim or someone otherwise affected by the offence, or to the community at large.<sup>230</sup> Under such an order, the offender would be required to make reparation by completing no more than 24 hours of work.<sup>231</sup> The reparation order specifically precludes the payment of compensation as reparation.<sup>232</sup> An order could not be imposed without consideration by a youth offending team of the type of work suitable to the offender and the

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<sup>228</sup> Zedner (2004), at 228

<sup>229</sup> See Greenlow (2003), at 267

<sup>230</sup> Section 73(1) PCCSA 2000

<sup>231</sup> Section 74(1)(a) PCCSA 2000

<sup>232</sup> Section 73(3) PCCSA 2000

victim's attitude to the proposed order.<sup>233</sup> The terms of the order were required to be commensurate to the seriousness of the offence.<sup>234</sup>

#### 2.5.2.9 Attendance Centre Order

Offenders aged under 21 could be "required to attend and be given under supervision appropriate occupation or instruction".<sup>235</sup> Most centres were open on alternate Saturday mornings or afternoons and were run by volunteering police officers, prison officers or school teachers.<sup>236</sup> There was an expectation that the order would run for 12 hours, unless the offender was aged under 14 and 12 hours was thought to be excessive.<sup>237</sup> Furthermore, the order could not exceed 12 hours unless the court felt that this would be inadequate, in which case 24 hours was the maximum for an offender aged under 16, or 36 hours if the offender was over 16.<sup>238</sup> Each session could not exceed three hours.<sup>239</sup> Consequently, although the offender was not deprived of his liberty for a particularly long time, the order would not usually be completed in fewer than four sessions running over eight weeks. During the sessions, the offender would be kept under firm discipline and would be expected to engage in various activities including handicrafts, first aid, citizenship and physical training.<sup>240</sup> The aim of the order was not only to punish the offender through the deprivation of his leisure time, but also to encourage him to use his leisure time more constructively once it was restored to him.<sup>241</sup>

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<sup>233</sup> Section 73(5) PCCSA 2000

<sup>234</sup> Section 74(2) PCCSA 2000

<sup>235</sup> Section 62(2) PCCSA 2000

<sup>236</sup> Wasik (2001*a*) at page 200

<sup>237</sup> Section 60(3) PCCSA 2000

<sup>238</sup> Section 60(4) PCCSA 2000

<sup>239</sup> Section 60(10) PCCSA 2000

<sup>240</sup> Wasik (2001*a*) at page 201

<sup>241</sup> Sprack (2004) at page 462

#### 2.5.2.10 Drug Treatment and Testing Order

For an offender aged 16 or over, the court had the power to impose a drug treatment and testing order (DTTO) if it was satisfied that the offender was dependent on, or had a propensity to misuse drugs, and that dependency may be susceptible to treatment.<sup>242</sup> As with all other community sentences, the court must be satisfied that the offence is “serious enough to warrant a community sentence” The order could be long-reaching, lasting for between six months and three years. During the course of the order, the offender would be treated for his dependency, with an aim of tackling the dependency. The offender would also be subject to regular testing to ascertain whether he was still using drugs.

#### 2.5.2.11 The Generic Community Sentence and the Criminal Justice Act 2003

Following a recommendation made by the Halliday Report, the Criminal Justice Act 2003 replaced the myriad of community orders previously available with a single, generic community sentence. Halliday had criticised the earlier provisions relating to community sentences as being unduly complex, with different orders being subject to different statutory restrictions.<sup>243</sup> The regime offered no indications of the punitive weight of each order, rendering proportionality largely unachievable.<sup>244</sup> The positioning of community penalties on the sentencing hierarchy had also become unclear. Community penalties had once been thought of as alternatives to imprisonment, but this notion had been abandoned and

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<sup>242</sup> Section 52(3) PCCSA 2000

<sup>243</sup> For one thing, different orders were available for different age groups. CRO, CPO, CPRO and DTTO was available for offenders aged over 16, supervision and action plan orders were available for offenders aged 10-17, an attendance centre order could only be imposed on an offender aged under 21, but a curfew was available for offenders of any age.

<sup>244</sup> Halliday (2001) at para 6.4

community sentences were since deemed to be sentences in their own right. The Act provides 12 requirements which the sentencing court may attach to a community sentence.<sup>245</sup> Many of these requirements replace similar options previously available. For example, the drug treatment and testing order has been directly replaced with the drug rehabilitation requirement, which still requires the offender to undergo treatment and testing for drug misuse. As with the DTTO, before imposing a drug rehabilitation requirement, the court must be satisfied that the offender is dependent on, or has a propensity to misuse drugs, and that the dependency may be susceptible to treatment.

The community sentence threshold was retained by the 2003 Act. According to section 148(1) of the Act, the court must only pass a community sentence if, in the court's opinion, the offence is serious enough to warrant such a sentence. This prohibits the use of community sentences where the offence is not serious enough, but does not compel the court to impose a community sentence whenever the threshold is passed: "even where the threshold for a community sentence has been passed, a financial penalty or discharge may still be an appropriate penalty."<sup>246</sup> In addition to the seriousness threshold given in section 148(1) of the Act, the courts also have a power to impose a community sentence on an offender who has previously been fined on three or more occasions, whose current offence does not satisfy the seriousness threshold under section 148(1), and where the court believes that it is in the interests of justice to impose a community sentence. This may be an attractive provision for the courts when dealing with persistent petty offenders (including shoplifters), but the SGC has warned that "great care will be needed in assessing whether a community sentence is appropriate since failure to comply could result in a custodial sentence."<sup>247</sup>

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<sup>245</sup> Section 177 CJA 2003

<sup>246</sup> SGC (2004a) para 1.36

<sup>247</sup> SGC (2004b) para 1.1.10

Ultimately, this provision could lead to offenders being subjected to severe penalties which are disproportionate to their minor crimes.<sup>248</sup>

### 2.5.3 Financial Penalties

The fine is the most commonly invoked penalty for summary offences and either-way offences sentenced by the magistrates' court. The fine has been described as "the ideal penal measure. It can be easily calibrated, so that courts can reflect differing degrees of gravity and culpability",<sup>249</sup> although this is equally true of other penalties. The fine also "involves no physical coercion and is non-intrusive since it does not involve supervision or the loss of [the offender's] time",<sup>250</sup> a point which Ashworth clearly regards as a positive. Studies on reoffending tend to suggest that fines correspond with lower reconviction rates than other penalties, although this does not necessarily demonstrate the fine's efficacy in reducing crime. As Bottoms has rightly highlighted, fines tend to be imposed on offenders whose lives demonstrate some stability, which may be associated with a lower risk of reoffending.<sup>251</sup> Consequently, the fact that offenders who are fined are less likely to reoffend than offenders sentenced by other means is not necessarily reflective of the penalties' effectiveness in reducing crime.

The Criminal Justice Act 1991 introduced the 'unit fine' scheme whereby fines were calculated in reference to the seriousness of the offence and the offender's financial means. The system was heralded by some for its fairness, precision and consistency.<sup>252</sup> Section 18(2)

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<sup>248</sup> Ashworth (2010a), at 341

<sup>249</sup> Ashworth (2010a), at 327. See also, von Hirsch, Wasik & Greene (1989), at 611

<sup>250</sup> Ibid, page 327-328

<sup>251</sup> Bottoms (1973)

<sup>252</sup> Moore, (2003), at 14. See also Greene, (1998)

of the 1991 Act provided for the amount of the fine to be determined by reference to a number of units “commensurate with the seriousness of the offence” and a value given to each unit which represents “the offender’s disposable income.” Sentencers opposed the scheme due to the perception of large fines being levied on wealthy offenders whilst less affluent offenders were given what appeared to be low level fines.<sup>253</sup> This was, of course, the intention of the scheme: that the penal bite of a fine should be maintained regardless of the offender’s wealth by imposing fines where the amount is fixed according to the offender’s financial status.

The unit fine scheme was relatively short lived, being abolished by the Criminal Justice Act 1993. Under the 1993 regime, which was carried over into the consolidating Powers of the Criminal Courts (Sentencing) Act 2000, greater flexibility was reintroduced into the fining system. The level of fine was still required to reflect the seriousness of the offence,<sup>254</sup> and the offender’s means was still a relevant factor in determining the level of the fine. Before imposing a fine, the court was under an obligation to inquire into the offender’s financial circumstances,<sup>255</sup> and would consequently take these circumstances into account when determining the level of the fine to be imposed.<sup>256</sup> The level of fine could then be adjusted on account of the offender’s financial means by “increasing or reducing the amount of the fine” to be paid.<sup>257</sup> The 1993 regime was criticised by some for lacking the clarity of the unit scheme under the 1991 Act.<sup>258</sup>

By taking into account the offender’s financial position, the fine remains a viable sentencing option for all offenders, regardless of wealth. Where the seriousness of an offence warranted

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<sup>253</sup> Moore (2003), at 14; Ashworth (2010a), at 330; Raine & Dunstan (2009), at 17.

<sup>254</sup> Section 128(2) PCCSA 2000

<sup>255</sup> Section 128(1)

<sup>256</sup> Section 128(3)

<sup>257</sup> Section 128(4)

<sup>258</sup> Gibson & Ashworth (1994), at 107



a fine, the level of the fine could be inflated for a wealthy offender or reduced for an impoverished offender, whilst maintaining an equal and fair penal bite. Furthermore, it is in the interests of justice for the level of the fine to be realistically payable by the offender; fixing a fine so large that the offender cannot pay is counterproductive and may entice the offender into further criminality in order to be able to make the payment.<sup>259</sup>

This approach to fines was re-enacted in the Criminal Justice Act 2003. As with the PCCSA 2000, the level of the fine should reflect the seriousness of the offence.<sup>260</sup> The courts should also take into account the offender's financial circumstances in determining the amount of the fine,<sup>261</sup> which may have the effect of either increasing or reducing the level of the fine.<sup>262</sup>

Determining the level of the fine on the basis of the offender's means ought to safeguard against wealthy offenders avoiding a custodial sentence where the offence would usually warrant imprisonment. It also ensures the impoverished offender is not imprisoned for an offence which merely warrants a fine but for which he lacks the means to pay.

Ultimately, the principle is that where an offence warrants a fine, that is the penalty which ought to be imposed. The penal bite can be ensured by fixing the level of the fine in terms of the offender's financial means. It would not be desirable for a court to fix the level of fine without having regard to the offender's means,<sup>263</sup> as Martin Wasik has noted, "punishment does not lie in the amount of the fine but in the degree of hardship and inconvenience caused by the need to pay it."<sup>264</sup>

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<sup>259</sup> Zedner (2004), at 208. On fine enforcement, see Whittaker & Mackie (1997).

<sup>260</sup> Section 164(2) CJA 2003

<sup>261</sup> Section 164(3)

<sup>262</sup> Section 164(4)

<sup>263</sup> The importance of 'equity of impact' attached by the courts in the context of fine setting was noted by Raine & Dunstan (2009).

<sup>264</sup> Wasik (2001a), at t216

## 2.5.4 Discharges

### 2.5.4.1 Conditional Discharges

When sentencing an offender for which the offence is not fixed by law, a court has the power to discharge him if it is of the opinion that it would be “inexpedient to inflict punishment”, having regard to the “nature of the offence and the character of the offender”.<sup>265</sup> The discharge may be either absolute, or made on the condition that the offender does not reoffend during the operational period of the order, which may run for up to three years.<sup>266</sup> If the offender is made subject to a conditional discharge and subsequently reoffends during this period, he is liable to be sentenced for the new offence and resentenced for the original offence in accordance with section 13(6) of the PCCSA 2000. In view of the fact that a discharge may only be imposed where the court considers it “inexpedient to inflict punishment”, it has been suggested that a discharge is not a punishment at all.<sup>267</sup>

Ashworth describes the conditional discharge as the courts offering a warning to the offender. The court is willing to impose no punishment for the offence on the condition that he does not reoffend during the operational period of the discharge.<sup>268</sup> A conditional discharge may pose an attractive disposal option to the courts where the offender is unlikely to reoffend (subject to the seriousness of the offence not being such that punishment is necessary). Indeed, the Halliday Report concluded that “the evidence shows that [discharges] are an effective disposal, attracting better than predicted reconviction rates.”<sup>269</sup>

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<sup>265</sup> Section 12(1) Powers of the Criminal Courts (Sentencing) Act 2000

<sup>266</sup> Section 12(1)(b)

<sup>267</sup> Wasik, (2001a), at 232

<sup>268</sup> Ashworth (2010a), at 321

<sup>269</sup> Halliday (2001) at para 6.19

However, the effectiveness of discharges in reducing reoffending could be due in part to any number of offender characteristics and not necessarily due to the disposals themselves.<sup>270</sup> If discharges are imposed on offenders whom the courts do not feel pose a threat of reoffending, it is only logically that (assuming the courts' assessment of reoffending risk is accurate) the reconviction rate will be lower than for offenders made subject of alternative sentence types (be it financial, community, or custodial).

In his review of Crown Court sentencing practice, Moxon found that the conditional discharge was mostly associated with single (rather than multiple) non-serious offending by offenders with no more than two previous convictions.<sup>271</sup>

#### 2.5.4.2 Absolute Discharges

An absolute discharge is the least severe order available to the courts upon conviction. It is not a punishment in any real sense, and does not place upon the offender any conditions or restrictions to his future conduct.<sup>272</sup> Upon an absolute discharge being imposed, the offender is effectively free to go without any real consequence for his offending, other than a conviction being recorded.

Absolute discharges are rarely imposed by the courts, being applied in 0.7 percent of all cases in 2008.<sup>273</sup> Perhaps unsurprisingly, the absolute discharge is imposed by the Crown

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<sup>270</sup> This fact has led the Ministry of Justice to ignore comparisons of reoffending by disposal option in its annual *Reoffending of Adults* series.

<sup>271</sup> Moxon (1988), at 47-48

<sup>272</sup> A. Ashworth (2010a), at 320

<sup>273</sup> Ministry of Justice (2010b), Supplementary Table 5.1

Court with exceptional rarity.<sup>274</sup> In his review of the use of absolute discharges,<sup>275</sup> Wasik found that the order may be imposed where the offender was technically guilty of an offence but was not morally blameworthy, meaning that it is not in the public interest to impose any measurable punishment upon the offender.<sup>276</sup> Alternatively, an absolute discharge may be imposed where an offender is sentenced for multiple offences at the same time. The court may impose a more punitive penalty only for the most serious offence. Other lesser offences may be dealt with by way of an absolute discharge.

## 2.6 Conclusions

Proportionality has been of significant importance under the sentencing framework of both the 1991 and 2003 Acts. Although the 2003 Act also makes reference to non-proportionality based considerations, sentences are still required to reflect the seriousness of the offence, although the legislation has made some movement away from a purely proportionality-based sentencing model by making reference to crime-reduction sentencing purposes and affording an increased role to previous convictions. Paradoxically, the 2003 Act is in some respects clearer on the meaning of proportionality than its predecessor. The 1991 Act offered no guidance to the courts in how to construe offence seriousness, yet the 2003 Act points the courts attention toward the offender's culpability and the level of harm in determining seriousness.<sup>277</sup>

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<sup>274</sup> In 2008, only 68 cases sentenced in the Crown Court resulted in an absolute discharge, representing less than 0.1 percent of all cases sentenced by the Court. See *ibid*, Supplementary Table 2.1A

<sup>275</sup> M. Wasik (1985)

<sup>276</sup> See for example, *Harrison* [2004] EWCA Crim 1547, in which an absolute discharge was imposed upon an insulin-dependent diabetic, who was convicted for dangerous driving. The dangerous driving was brought on by a hypoglycaemic attack, for which the offender could not be held to blame.

<sup>277</sup> Section 143(2) CJA 2003

For a desert-based system to be workable and adopted by the courts, proportionality should be construed so as to allow the courts to select the most appropriate sentence for an offender, within the confines set by proportionality.

*"Tailoring punishments that are appropriate to the seriousness of the offence yet responsive to the needs of individual offenders prioritises the effectiveness of sentences in reducing re-offending and recognises the dysfunctional consequences of short prison sentences."*<sup>278</sup>

This has become a staple requirement concerning community sentences. Section 35(3)(a) of the Powers of the Criminal Courts (Sentencing) Act 2000 provided that a community sentence could only be imposed if the court was satisfied that the specific order was the most suitable for the offender.<sup>279</sup> Furthermore, before imposing a drug treatment and testing order, the court needed to be satisfied that the offender's propensity to misuse drugs was susceptible to treatment.<sup>280</sup> Tailoring punishments that are appropriate for the offender is perhaps particularly important where repeated acquisitive crime is driven by criminogenic need. Providing the offender is susceptible to treatment, a rehabilitative approach may be worthy of careful consideration, benefiting as it would both the offender and the wider community by reducing his propensity to reoffend. But where the offender is not susceptible to treatment, striving toward a rehabilitative goal would be fruitless.

Where proportionality has failed to retain its central function is in the perceived greater role afforded to previous convictions at sentencing, by the 2003 Act rescinding the progressive loss of mitigation approach and favouring a cumulative approach. Cumulative sentencing cannot fit easily within a desert framework. An offender's lengthy criminal record may overshadow the seriousness of the current offence as the primary sentence determinant.

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<sup>278</sup> Ashworth & Player (2005), at 836

<sup>279</sup> The same provision was subsequently re-enacted under section 148(3)(a) CJA 2003

<sup>280</sup> Section 52(3)(b) PCCSA 2000

## CHAPTER THREE

### PRINCIPLES AND POLICIES FOR THE SENTENCING OF THEFT

#### 3.1 Introduction

This chapter will move from the generic sentencing principles discussed in the foregoing chapter, to consider issues specifically relating to sentencing for theft. The purpose here is to evaluate the perceived seriousness of the offence, with particular reference to the courts' sentencing powers and offence-specific guidelines.

#### 3.2 Theft and the Courts' Sentencing Powers

##### 3.2.1 The Statutory Maxima and Courts' Sentencing Powers

Section 1(1) of the Theft Act 1968 provides:

A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; and 'thief' and 'steal' shall be construed accordingly.<sup>1</sup>

The offence is triable either way and was originally punishable with a maximum of 10 years' imprisonment on indictment,<sup>2</sup> but this was later reduced to seven years by section 26 of the

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<sup>1</sup> For a comprehensive analysis of the substantive law of theft, see Griew (1995) chapter 2, and more recently Ormerod & Williams (2007) chapter 2.

<sup>2</sup> Section 7 Theft Act 1968

Criminal Justice Act 1991.<sup>3</sup> When tried summarily, magistrates' sentencing powers currently extend to a maximum six months' imprisonment and/or a fine not exceeding £5,000.<sup>4</sup> Where the magistrates' court sentences an offender for two or more offences, the sentences (each no greater than 6 months' imprisonment) can be ordered to run consecutively. The aggregate term of imprisonment must not exceed 12 months.<sup>5</sup> Consequently, where an offender is to be sentenced for more than one offence, the extended available sentence may lead the magistrates to retain jurisdiction rather than referring the case to the Crown Court. The enactment of section 154 of the Criminal Justice Act 2003 will lead to increased sentencing powers for magistrates from six to 12 months' imprisonment for each offence, although there are currently no plans to bring this provision into force.<sup>6</sup> For offences such as theft where a maximum penalty is prescribed, that maximum should be used only in the most serious examples of behaviour falling within the offence.<sup>7</sup> For other (less serious) forms of the offence, a lesser penalty would be appropriate. The most serious form of an offence may be difficult, or impossible, to identify and may be heavily informed by subjective notions of seriousness: the same views of offence seriousness may not be universally held by all. Furthermore, even if the most serious form of an offence exists in theory, it may not exist in practice. Consequently, the (practical) maximum penalty may only ever be of theoretical application.

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<sup>3</sup> This reduction in maximum penalty was ruled by the Court of Appeal to have retrospective effect; *Shaw* [1996] 2 Cr App R (S) 278

<sup>4</sup> Section 78(1) Powers of the Criminal Courts (Sentencing) Act 2000

<sup>5</sup> Section 133(2) Magistrates' Courts Act 1980

<sup>6</sup> The upper limit of six months' imprisonment for one offence does not apply where the offence's statutory maxima is less than six months. The magistrates may only impose a maximum of six months' imprisonment or the statutory maxima, whichever is the less.

<sup>7</sup> Advisory Council on the Penal System (1978), page 38

### 3.2.2 Mode of Trial

As an either way offence, theft may be tried (and sentenced for) in either the magistrates' court or the Crown Court. According to the National Mode of Trial Guidelines,<sup>8</sup> theft should be tried summarily unless the magistrates' court considers that its sentencing powers are insufficient,<sup>9</sup> and the offence involved either (i) a breach of trust by a person in a position of substantial authority, (ii) theft committed in a sophisticated manner, (iii) theft committed by an organised gang, (iv) offending against a particularly vulnerable victim, or (v) theft of high value goods which were not recovered.<sup>10</sup> Accordingly, a theft trial will usually only reach the Crown Court where the magistrates are of the opinion that the seriousness of the offence warrants trial in the higher court.<sup>11</sup> Alternatively, the Crown Court may hear a theft trial where the defendant exercises his right to elect a jury trial in the Crown Court, leading to the possibility of the Crown Court hearing cases involving even the most minor forms of the offence.

In his review of the mode of trial decision, Cammiss found that theft from a motor vehicle would almost always be deemed suitable for summary trial.<sup>12</sup> Furthermore, shop theft was generally excluded from his study as it would almost never be viewed as sufficiently serious to justify referral to the Crown Court.<sup>13</sup> Cammiss did conclude, however, that where the value of the property stolen is over £10,000 the case would be "deemed to be unsuitable for summary trial regardless of any other case features."<sup>14</sup> It is quite probable that offences involving such high values would be committed by persons in a high position of trust who

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<sup>8</sup> *Practice Direction (Criminal Proceedings: Consolidation)* [2002] 1 WLR 2870, para. 51

<sup>9</sup> *Ibid*, at para.51.3(f)

<sup>10</sup> *Ibid*, at para. 51.7

<sup>11</sup> However, Herbert (2004) found a variation in mode of trial decision-making patterns between different magistrates' courts, with decisions seemingly being influenced by local culture.

<sup>12</sup> Cammiss (2004), at 227

<sup>13</sup> *Ibid*, at 185

<sup>14</sup> *Ibid*, at 259



have access to such sums, perhaps in company or client accounts, and may rightly justify transference to the Crown Court in accordance with the National Mode of Trial Guidelines.<sup>15</sup>

### 3.2.3 Committal for Sentencing

Following a conviction or guilty plea before the magistrates, the court can proceed to pass sentence, albeit within the confines of its limited sentencing powers.<sup>16</sup> Following a finding of guilt, the magistrates have the power to commit a case to the Crown Court for sentencing if the magistrates are of the opinion that the offence, together with any associated offences, was “so serious that greater punishment should be inflicted for the offence than the court has power to impose”.<sup>17</sup> Similarly, they may also commit to the Crown Court following the offender’s indication of a guilty plea.<sup>18</sup> Where a case is committed to the Crown Court for sentencing, the Court may proceed to sentence the offender in the same way as if he were convicted on indictment, thereby utilising its greater sentencing powers.<sup>19</sup>

### 3.3 Out of Court Disposals

On occasion, an offender may escape a court appearance by being issued with, and accepting, an out of court disposal. These options, which include cautions, conditional

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<sup>15</sup> Either under para 51.7(a), “breach of trust by a person in a position of substantial authority...” or where the property has a value in excess of £10,000 and is not recovered (para 51.7(e).

<sup>16</sup> Herbert (2003) has cast doubt on any claim that the magistrates’ increased sentencing powers under section 153 CJA 2003 (once enacted, if ever) will have the anticipated effect of lowering the committal rate.

<sup>17</sup> Section 3(2)(a) Powers of the Criminal Courts (Sentencing) Act 2000. Once section 41 and Schedule 3 of the Criminal Justice Act 2003 are enacted, magistrates will lose their power to commit to the Crown Court once they have accepted to hear the case, unless the criteria for an extended sentence or sentence for public protection are met. Magistrates will retain their power to commit for sentencing following an offender’s guilty plea before venue.

<sup>18</sup> Section 4 Powers of the Criminal Courts (Sentencing) Act 2000.

<sup>19</sup> Section 5(1) Powers of the Criminal Courts (Sentencing) Act 2000

cautions, warnings, reprimands, and penalty notices for disorder, aim to deal with less serious offences quickly, by avoiding court procedures entirely, and may reduce the likelihood of reoffending by saving the offender from the negative effects which stem from acquiring a criminal record:<sup>20</sup> “once a person is publically identified as a deviant...it becomes difficult for him or her to slip back into the conventional world.”<sup>21</sup>

### 3.3.1 Cautions

When dealing with adult offenders, police have a discretion to issue a formal caution as an alternative to prosecution. This discretion is regulated by the National Standards for Cautioning,<sup>22</sup> which state that a caution may only be issued where there exists sufficient evidence against the offender to give rise to a realistic prospect of conviction. Additionally, the offender must admit the offence, and a caution must be in the public interest.<sup>23</sup>

### 3.3.2 Conditional Cautions<sup>24</sup>

More recently, the police have been granted powers to issue to an adult offender a caution complete with certain conditions.<sup>25</sup> The conditions attached may aim to facilitate the offender’s rehabilitation or may require the offender to undertake reparation.<sup>26</sup> The requirements to be met before a conditional caution may be imposed are listed in section 23

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<sup>20</sup> These out of court disposals are recorded by the police but do not count as criminal convictions. The subject thereby escapes acquiring a criminal record.

<sup>21</sup> Rock (2007), at 31.

<sup>22</sup> Contained within Home Office Circular 18/1994

<sup>23</sup> Ibid, at paragraph 2

<sup>24</sup> For a review of the perceived advantages and disadvantages of conditional cautions, see Brownlee (2008).

<sup>25</sup> Conditional cautions were created by sections 22-27 of the Criminal Justice Act 2003.

<sup>26</sup> Section 22(3)

of the 2003 Act, and include: that the evidence against the offender must be sufficient to instigate charge proceedings, the offender must admit the offence, and the conditional caution must be deemed to be an appropriate disposal.

### 3.3.3 Warning and Reprimands

The power to formally caution a young offender was revoked upon the enactment of the Crime and Disorder Act 1998, which now provides the police with a discretion to reprimand or warn a young offender. Either may only be imposed where, (a) there is evidence that an offence has been committed, (b) evidence is sufficient for a realistic prospect of conviction, (c) the offender admits to having committed the offence, (d) the offender has no previous conviction, and (e) it is not in the public interest for the offender to be prosecuted.<sup>27</sup> In addition to these conditions, a reprimand may only be imposed where the offender has not previously been reprimanded or warned. A second reprimand or a reprimand following an earlier warning or conviction is thereby prohibited.<sup>28</sup> A warning may be granted where the offender has previously been reprimanded, but not warned, or where the offence for which a previous warning was given was committed more than two years' ago *and* the seriousness of the offence does not require a prosecution.<sup>29</sup>

In 2008, 60,284 offenders were issued with a caution, conditional caution, warning or reprimand.<sup>30</sup> Of these 28,677 were aged under 18, who would have received a reprimand or

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<sup>27</sup> Section 65(1) Crime and Disorder Act 1998.

<sup>28</sup> Section 65(2)

<sup>29</sup> Section 65(3)

<sup>30</sup> The Criminal Statistics deal with all four disposal types collectively. Consequently, it is not possible to identify the number of each disposal individually, although the statistics are broken down by age group, so it is possible to calculate the number of warnings and reprimands imposed (albeit not separately) as opposed to cautions and conditional cautions.

warning. The remaining 31,607 were over the age of 18, and would have been issued with a caution or conditional caution.<sup>31</sup>

### 3.3.4 Penalty Notices for Disorder

Since late 2004, an offender caught committing retail theft of property with a value of less than £200 (but not usually greater than £100) has been able to avoid a court hearing by accepting a Penalty Notice for Disorder (PND), carrying an on-the-spot £80 fine.<sup>32</sup> In 2008, PNDs were imposed on 45,616 occasions for offences of retail theft.<sup>33</sup> This disposal is only available where it is deemed to be the most suitable option, taking into account the interests of justice, and is therefore not considered appropriate for repeat or prolific offenders or for known substance misusers.<sup>34</sup> It has therefore been established that PNDs are not suitable for all offenders. Indeed, even if *prima facie* the criteria for imposing a PND are satisfied, an offender may still be prosecuted either because the offender wishes to have a court hearing, or through the exercise of the CPS's discretion to prosecute rather than accept an out of court disposal.

### 3.3.5 Out of Court Disposals and the Impact on Sentencing

Each of the out of court disposal options considered above require the offender to admit the offence of which they are accused. This opens up the disposal options to criticism as unduly pressurising a suspect into giving a false admission for the offence in order to avoid the risk

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<sup>31</sup> Ministry of Justice (2010b) Table 3.7a

<sup>32</sup> Penalties for Disorderly Behaviour (Amount of Penalty) (Amendment No 2) Order 2004, SI 2468

<sup>33</sup> Ministry of Justice (2010b) Table 3.10e

<sup>34</sup> Home Office (2005) para 6.20-6.21

of prosecution.<sup>35</sup> This should be safeguarded against by the requirement that no out of court disposal may be issued without sufficient evidence to support a prosecution. Claims have been made however that some suspects are cautioned *because* of a lack of evidence to secure a conviction.<sup>36</sup> It must also be remembered that none of the above disposal options constitute a conviction. By accepting the option, the offender avoids the risk of acquiring a criminal record. This alone may offer a compelling enough reason to accept the disposal option.

Any increase in the use of out of court disposals, which is not explained by an increase in the crime rate, will have a corresponding effect on the number of offenders proceeded against in the courts and may consequently have an impact on the numbers sentenced by the courts.<sup>37</sup> This may be particularly true with thefts against retailers where, in addition to the powers to issue a caution, warning or reprimand (which may be available for all forms of theft) the police may also deal with the offence by way of a PND.<sup>38</sup>

### 3.4 Theft and Sentencing Guidelines

The diversity in types of theft and their relative seriousness is made apparent when consulting the various guidelines emanating from the Court of Appeal and Sentencing Guidelines Council (SGC). On the one hand, breach of trust has been identified for many

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<sup>35</sup> Sprack (2004), at 70

<sup>36</sup> Sanders (2002), at 154

<sup>37</sup> Professor Ashworth noted the strong movement towards the use of diversionary disposals had resulted in a "considerable reduction in the number of indictable offenders sentenced by the courts" during the 1980s and 1990s. Ashworth (2001), at 84

<sup>38</sup> It is difficult to conclusively examine how a rise in the use of out of court disposals may affect the number of sentenced offenders as any change in the number of sentences imposed may be explained by a change in the crime rate. Although figures for recorded crime (along with a clear-up rate) are published (A. Walker, J. Flatley et al, *Crime in England and Wales 2008/09* (Home Office Statistical Bulletin 11/09, 2009, Home Office)) these cover the fiscal year, whereas sentencing statistics are based on the calendar year, rendering comparisons difficult.

years as a particularly serious form of theft, often deserving a period of immediate imprisonment. However, more recently, the Court of Appeal and SGC have agreed that theft from a retailer is somewhat less serious, usually warranting a non-custodial penalty. Theft has, over the years, been the subject of a number of sentencing guidelines. The Magistrates' Association Sentencing Guidelines included a guideline for theft, with a separate entry for theft committed in breach of trust to provide for the more serious nature of the offence. The Court of Appeal over the years provided a number of guideline judgments relating to specific forms of the offence, although not all forms were covered. The SGC now includes entries in its sentencing guidelines relating to four forms of theft: theft from the person, theft from a dwelling, theft from a shop, and theft in breach of trust.

### 3.4.1 Magistrates' Association Sentencing Guidelines<sup>39</sup>

The Magistrates' Association Sentencing Guidelines (2000) provided detail on sentencing for a range of offences including theft.<sup>40</sup> For each offence, magistrates were presented with the maximum penalty prescribed for the offence, and were directed to a prescribed sentence band (either a fine, discharge, community penalty or custodial sentence). The Guidelines also provided magistrates with a list of relevant aggravating and mitigating factors that ought to be taken into consideration when deciding on the appropriate sentence, although the list was not exhaustive and the guidelines did not go so far as to suggest the weight that ought to be placed on each of these factors: sentencers retained a judicial discretion in deciding the importance to be placed on the presence (or absence) of each factor.

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<sup>39</sup> These guidelines have been superseded by guidelines emanating from the Sentencing Guidelines Council (SGC), but are included here as they were applicable to this study's sample of cases.

<sup>40</sup> This single volume is currently being replaced by the Sentencing Guidelines' Council's definitive guidelines, being issued piecemeal. The latter are of wider application, requiring every sentencing court in England and Wales to "have regard to any guidelines which are relevant to the offender's case." (section 172(1)(a) Criminal Justice Act 2003).

The Association's Guidelines included an entry for theft along with a separate guideline for theft committed in breach of trust, highlighting the perceived difference in seriousness between breach of trust cases and other thefts. For theft (non-breach of trust cases), the guideline was a community sentence. The list of aggravating factors included stealing property of high value, committing the offence as part of an organised team, committing the offence against a vulnerable victim and involving children in the commission of the crime. The list of mitigating factors in theft cases was limited to only two entries: offending on impulse and stealing property of a low value, for both of which the opposite (planned offending and high value respectively) amount to aggravation. For value and planning (or lack thereof) there is no neutral middle ground: the factors will either aggravate or mitigate. Once again it ought to be emphasised that the lists of factors were not exhaustive and allowed magistrates to consider any other factors which may present themselves.

Where theft was committed in breach of trust, magistrates had at their disposal a separate entry in the Association Guidelines. Whereas the guideline sentence for other thefts was a community sentence, the guideline for breach of trust was custody. As with theft, a number of aggravating factors (including casting suspicion on others, prolonged offending, offending by a senior employee) and mitigating factors (including impulsive offending, low value, a single transaction, and offending by an unsupported junior employee) were listed which may influence the magistrates' decision. The weight to be attributed to each factor is, as in all cases, to be determined by the sentencing bench.

### 3.4.2 Court of Appeal Guideline Judgments

Crown Court judges were not bound to follow the Magistrates' Association Sentencing Guidelines. However, they were required to have regard to guideline judgments emanating from the Court of Appeal.<sup>41</sup> When hearing an appeal against sentence, the Court would occasionally take the opportunity to provide guidance to the sentencing courts "as to the principles which should underlie sentencing in cases of that kind."<sup>42</sup> But the Court of Appeal could only create a guideline judgment if and when an appropriate case was brought before it. Tying the guideline and appeal systems together places an inherent restriction on the type of cases for which guidance can be offered. This raises two related points: firstly, an appeal would only reach the Court if the trial court's decision as to sentence is claimed to be too severe by the defendant or too lenient by the Attorney-General.<sup>43</sup> Consequently, only a "very skewed sample of cases"<sup>44</sup> go before the Court of Appeal. Secondly, the bulk of cases before the Court are at the serious end of the spectrum and are of limited application to the magistrates.<sup>45</sup> Since the vast majority of either-way cases are dealt with at the magistrates' court, Court of Appeal judges are not well placed to devise guidelines on these offences;<sup>46</sup> their past experience is based primarily in dealing with more serious offending. Indeed, even where a guideline judgment for an either-way offence is given, the Court of Appeal may still focus on the more serious forms of the offence which are primarily of relevance to the Crown Court.<sup>47</sup> Unfortunately, the Court of Appeal has never provided a guideline judgment on theft in general, nor has it provided guidelines

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<sup>41</sup> More recently, the role of producing guidelines has passed to the Sentencing Guidelines Council. See section 167-173 of the Criminal Justice Act 2003. As a sentencing court, the Crown Court must "have regard to any guidelines which are relevant to the offender's case" under section 172(1)(a) Criminal Justice Act 2003.

<sup>42</sup> Wasik (2003), at 240

<sup>43</sup> Ibid, at page 243

<sup>44</sup> Ibid.

<sup>45</sup> Wasik (2001a), at 373

<sup>46</sup> Wasik (2003), at 243

<sup>47</sup> See for example *Barrick* (1985) 7 Cr App R (S) 142 and *Clark* [1998] 2 Cr App R (S) 95 at section 3.4.2.1 below.



for all of the sub-categories of theft (such as theft from the person and theft from a dwelling). Under its role as deliverer of guideline judgments, the Court of Appeal principally considered two forms of theft: in breach of trust and from a shop. The main guideline judgments will now be discussed.

#### 3.4.2.1 Theft in Breach of Trust

The first theft-related guideline judgment to be issued by the Court of Appeal was *Barrick*,<sup>48</sup> which dealt with the 'top end' of the range of breach of trust offending; where the offender had been placed in a position of trust, for example, an accountant, solicitor, postal worker or bank employee, who abused the position to embezzle funds. The guidelines therefore would not extend to less serious thefts by employees, or thefts committed against friends or family members even where the victims had placed trust in the offender. The Court ruled that, except where the amount of money stolen is small, an immediate custodial sentence is inevitable, despite the fact that the offender will often be of good previous character and is unlikely to reoffend, not least because he will never again secure similar employment to facilitate future (similar) offending. The guideline terms of imprisonment were based principally on the amount of money stolen, although the Court emphasised that other factors will have to be considered.

These guideline terms were reviewed in *Clark*<sup>49</sup> to account for inflation and the reduction in the statutory maxima from ten to seven years. Where the amounts appropriated are not small but are less than £17,500 an immediate custodial sentence of up to 21 months was deemed appropriate. Cases involving sums not exceeding £100,000 would warrant two to

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<sup>48</sup> (1985) 7 Cr App R (S) 142

<sup>49</sup> [1998] 2 Cr App R (S) 95

three years' imprisonment, rising to up to four years where the sums did not exceed £250,000. Offences involving sums not exceeding £1million would merit sentences of up to nine years, made possible by the use of consecutive sentences for multiple counts. Where a case involved sums exceeding £1million a sentence exceeding 10 years' imprisonment may be imposed.

As mentioned above, the Court of Appeal in *Barrick* had acknowledged that offenders who enjoy a position of trust are unlikely to find future similar employment and would doubtfully reoffend. Despite this, the Court had recognised the need for significant terms of imprisonment in cases involving breaches of a high position of trust where significant sums are appropriated. This punitive attitude is not founded on the need to rehabilitate or incapacitate offenders. Rather, no doubt, it is based on the need to punish and, perhaps, deter potential offenders.

With reference only being made to significant sums of money, the guideline judgments of *Barrick* and *Clark* focused only on the more serious forms of breach of trust offending. The judgments are of limited application to the magistrates' courts, with the sentences prescribed all falling outside of the magistrates' jurisdiction.

#### 3.4.2.2 Theft from Shops

Towards the end of 2004, the Court of Appeal took the opportunity to provide some guidance for the sentencing of individual adult shoplifters in *Page, Maher and Stewart*.<sup>50</sup> The guideline judgment expressly excluded thefts committed by organised gangs or young

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<sup>50</sup> [2004] EWCA Crim 3358

offenders. The guiding principles offered by the Court were far from comprehensive, and were limited to only four points. Firstly, custody should be reserved as the sentence of last resort,<sup>51</sup> and would almost never be appropriate for a first offence except where the offence is aggravated by including the use of a child as an instrument for the commission of the offence. A number of earlier cases have called for immediate imprisonment in cases involving a child;<sup>52</sup> these rulings were to remain authoritative. Secondly, where the offence is attributable to a drug addiction, a drug treatment and testing order (DTTO) would often be the most appropriate sentence in an attempt to combat the cause of the offending behaviour, notwithstanding the order's low success rate.<sup>53</sup> It is worth noting here that in *Attorney General's Reference No 64 of 2003*<sup>54</sup> the Court held *inter alia* that such an order should only be imposed where there is a realistic prospect of reducing an offender's drug dependency. The Court had also noted that these orders will often be appropriate in cases of acquisitive offending such as theft. Thirdly, for offenders who perpetually commit minor forms of the offence, a custodial term not exceeding one month may be appropriate. Where the offender has also prepared equipment to facilitate the commission of the offence, up to two months' imprisonment may be called for. Finally, even where an offender is being sentenced for a number of retail thefts, the offence's comparatively low seriousness would rarely require a sentence beyond two years' imprisonment following a guilty plea, and would often merit not more than 12 to 18 months.

This final point particularly highlights the wide discretion left to sentencers by the Court of Appeal. The guideline judgment was undeveloped. Other than the single reference to

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<sup>51</sup> This was a restatement of an already well-established principle, both in English and International Law, that is of general application and not limited to cases of theft. See for example, Council of Europe, *Consistency in Sentencing* Recommendation (R)92(17) (1993) at para 5; *R v Kefford* [2002] 2 Cr App R (S) 495

<sup>52</sup> *R v Oakley* (1979) 1 Cr App R (S) 366; *R v Moss* (1986) 8 Cr App R (S) 276; *R v Goldrick* (1988) 10 Cr App R (S) 346; *R v Mariconda* 10 (1988) Cr App R (S) 356

<sup>53</sup> In one sample, only 30 per cent of DTTOs made were successfully completed; 67 per cent were revoked. However, the two-year reconviction rates of those whose orders were completed (53 per cent) was significantly lower than for revoked orders (91 per cent). See Hough et al (2003), at page 3

<sup>54</sup> [2004] 2 Cr App R (S) 22

DTTOs, the judgment ignored non-custodial sentencing options, which the statistics given above indicate are far more commonly imposed than terms of imprisonment.<sup>55</sup> Consequently, the judgment failed to consider the appropriate sentencing levels for the majority of shoplifting offences, preferring instead to concentrate on the more serious incidents of the offence. That being said, the Court had provided a clear message on the use of imprisonment: custody should be used as a last resort, and when imposed the terms of imprisonment would usually be relatively short. This is reflective of other statements given by the Court of Appeal on the use of imprisonment over the last three decades<sup>56</sup> and is also mirrored in the relatively short average custodial sentence lengths detailed in the recent sentencing statistics discussed above.

### 3.4.3 Sentencing Guidelines Council Guidelines

Since the enactment of the Criminal Justice Act 2003, the newly-formed Sentencing Guidelines Council (SGC) bears ultimate responsibility for formulating sentencing guidelines in England and Wales.<sup>57</sup> Following advice from the Sentencing Advisory Panel (SAP), the SGC published its draft guideline on the sentencing of adult offenders convicted of theft (and non-domestic burglary) in March 2008. This was followed by the definitive guideline in December of the same year.<sup>58</sup> As with all of its other guidelines, the SGC strives toward forming guidelines based on proportionate sentencing, where the seriousness of the offence is reflected in the severity of the penalty imposed. The theft guideline begins with an identification of the primary purpose of sentencing: assessing the seriousness of the offence

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<sup>55</sup> See section 3.2.2

<sup>56</sup> For example, *Bibi* (1980) 71 Cr App R (S) 360; *Ollerenshaw* (1999) 1 Cr App R (S) 65; *Seed*; *Stark* [2007] EWCA Crim 254

<sup>57</sup> More recently, section 118(1) of the Coroners and Justice Act 2009 has created a new body which will replace the Sentencing Guidelines Council and Sentencing Advisory Panel with a single Sentencing Council for England and Wales. For a review of the new Council's powers, duties and membership, see Ashworth (2010b)

<sup>58</sup> SGC (2008)

by determining an offender's culpability and the harm caused, risked or intended. The notion that offence seriousness is a composite of culpability and harm has been recently recognised by the English and Welsh legislature in section 143(1) of the Criminal Justice Act 2003.<sup>59</sup> The issue of offence seriousness has itself been the subject of a guideline from the SGC.<sup>60</sup> According to the Council's theft guideline, an offender convicted of theft will often have demonstrated a high level of culpability since the offences require the offender to have acted both dishonestly and intentionally,<sup>61</sup> although the precise level of culpability is shaped by the presence of factors such as motivation, the degree of planning, and whether the offender was in a position of trust.<sup>62</sup> In assessing the harm caused by the offence, the Council takes the view that the starting point should be the loss suffered by the victim, and that the seriousness of the offence will increase in line with the extent of the loss<sup>63</sup> but, as with assessing the offender's culpability, the precise level of harm will be affected by other factors such as the vulnerability of the victim and whether the offender intended to steal property of a greater or lesser value than that actually taken.

Whereas the Court of Appeal's guideline judgments traditionally took on a narrative form rather than the numerical approach favoured by many of the American sentencing commissions,<sup>64</sup> the Council's guidelines have moved somewhat toward the numerical. Four forms of theft are each represented by a separate guideline; theft in breach of trust, theft from a shop, theft from the person, and theft in a dwelling. For each form, a number of descriptions (either three or four) are given, each one describing a "type" of the offence which is more serious than the one below it. Then for each type a sentencing range and prescribed starting point is given.

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<sup>59</sup> Proportionality theorists have long identified harm and culpability as the two elements which make up offence seriousness. See for example von Hirsch (1985) chapter 6

<sup>60</sup> SGC (2004a)

<sup>61</sup> SGC (2008), page 4

<sup>62</sup> Ibid

<sup>63</sup> Ibid

<sup>64</sup> For a discussion on the advantages and disadvantages of either approach see von Hirsch (1987b), at 46-69.

#### 3.4.3.1 Theft in Breach of Trust

A version of the SGC's guideline for theft in breach of trust is given below. As with the earlier guidance on theft in breach of trust, the main factor used in determining sentence is the value of funds appropriated. However, the SGC has widened the scope of the guidance previously offered by the Court of Appeal to encapsulate the less serious forms of the offence, which should now provide greater guidance for the magistrates' court.

Theft in breach of trust remains to be viewed as the most serious form of theft, often deserving a custodial sentence where the offender enjoyed a high position of trust and stole significant sums. However, the guidelines indicate that a non-custodial sentence may be appropriate in the least serious forms of the offence. This is not necessarily contrary to the earlier guideline judgments emanating from the Court of Appeal, which ignored all but the more serious forms of the offence, and for which custody was always prescribed.

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SOURCE: Sentencing Guidelines Council, *Theft and Burglary in a Building other than a Dwelling: Definitive Guideline* (2008, Sentencing Guidelines Council), page 11

#### 3.4.3.2 Theft from a Shop

Retail theft is the only form of the offence for which the SGC guidelines prescribe a conditional discharge within the sentence range at the lower end of the offending scale. At the same time, custodial sentences remain an important fixture of the guidelines, particularly at the higher reaches of the offence seriousness, indicating the wide scope of offending which may fall within the guideline.

As with the other forms of theft, for more serious offending, the guidelines prescribe sentences beyond the jurisdictions of the magistrates' courts, thereby requiring some cases of each type of theft to be referred to the Crown Court.

**Table3.2: SGC Guideline on Retail Theft**

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SOURCE: Sentencing Guidelines Council, *Theft and Burglary in a Building other than a Dwelling: Definitive Guideline* (2008, Sentencing Guidelines Council), page 17



### 3.4.3.3 Theft from the person and theft in a dwelling

The descriptions, starting points and sentence ranges for theft from the person and theft in a dwelling are identical to one another and so can be dealt with together. They each provide three types of the sub-categories of theft based on the vulnerability of the victim and any intimidation or force used.

**Table3.3: SGC Guideline on Theft in a dwelling and from the person**

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SOURCE: Sentencing Guidelines Council, *Theft and Burglary in a Building other than a Dwelling: Definitive Guideline* (2008, Sentencing Guidelines Council), page 13 and 15

As with other forms of the offence, courts are guided to utilise a range of sentencing options when dealing with theft from the person or in a dwelling. The most serious forms of the offence (where the theft is committed against a vulnerable victim and involves intimidation) will, it appears, always warrant a custodial sentence attracting as it does a sentence range of 12 months to three years' imprisonment. Where the offence is committed against a non-

vulnerable victim, the offender may escape a custodial sentence. In light of the prescribed starting points and sentence ranges, the SGC guidelines appear to view theft from the person and in a dwelling as less serious than thefts in breach of trust but more serious than thefts against retailers.

#### 3.4.3.4 Application and Effects of the SGC's Guidelines

The Council's guidelines apply to first-time offenders at a contested trial; a guilty plea should be rewarded with a sentence discount in line with the separate guideline, *Reduction in Sentence for a Guilty Plea*.<sup>65</sup> In short, the SGC recommends a discount of one third where an offender enters a guilty plea at the earliest opportunity, falling to one tenth where the plea is entered "at the 'door of the court' or after the trial has begun".<sup>66</sup> In accordance with section 143(2) of the Criminal Justice Act 2003, any previous convictions must be treated as a source of aggravation, thereby increasing the seriousness of the offence, and the presence of such may place the offence over the custody or community sentence thresholds "even though the other offence characteristics would otherwise warrant a lesser sentence."<sup>67</sup> The Council expects the sentencing court to identify the offence description (from the three or four "forms" of the offence provided in the guideline) that most closely matches the facts of the instant case. This will provide the sentencing court with the appropriate starting point. The court must then take into account any aggravating and mitigating factors to reach the provisional sentence. Therefore, a discount may be granted to an offender who enters a guilty plea before trial, but a sentence increase could be added where the offender has a history of similar behaviour.

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<sup>65</sup> SGC (2007)

<sup>66</sup> Ibid, at 5

<sup>67</sup> SGC(2008), at 16

Sentencers retain greater power by the fact that they may depart from the prescribed sentence ranges: having taken into account all relevant factors, it may be appropriate for a court to pass a sentence which falls outside (either above or below) the range given. For example, an offender with no previous convictions, who entered an early guilty plea and was able to rely on a number of mitigating factors, may have imposed upon him a sentence below the range prescribed for his conduct type. If, on the other hand, an offender had a lengthy criminal record and his case involved a number of aggravating features which significantly increased the seriousness of the offence, the sentence may fall above the sentence range set. Although this may appear to curtail the usefulness of the guidelines, it does address the concerns that guidelines markedly fetter judges' discretion in sentencing by recognising that the guidelines cannot hope to cover all eventualities.<sup>68</sup> Ultimately, if a court believes that imposing a sentence within the guidelines prescribed range in a given case would lead to an injustice, the sentencer is in the best position, having knowledge of the full details surrounding the case, to ensure the sentence passed is just. In practice, sentencers may be apprehensive of passing a sentence beyond the prescribed range as this may give the offender good grounds for appeal claiming that the penalty imposed is manifestly excessive.

The disparity in English sentencing across most crimes (as well as other jurisdictions) is well known.<sup>69</sup> One aim of any guidelines system is to promote a consistent approach in sentencing, and its success may well be measured on the basis of its ability to inhibit disparity.<sup>70</sup> Indeed, s.170(5)(a) of the Criminal Justice Act 2003 places a statutory duty on the SGC to have regard to "the need to promote consistency in sentencing" when framing its sentencing guidelines. So how likely is it that the Council's guidelines on theft will lead to

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<sup>68</sup> On the perceived judicial opposition to guidelines see, Tonry (2002), at 99-100

<sup>69</sup> Bagaric (2001) page 253; Tarling (1979); Tarling (2006)

<sup>70</sup> Tonry (1987)

more consistent sentencing? For a number of years, each magistrate has been armed with a copy of the Magistrates' Association Sentencing Guidelines which offered little in the way of constructive guidance in helping the bench to decide on the sentence to be imposed. The guidelines provided a non-exhaustive list of aggravating and mitigating factors, and furthermore they fundamentally failed to indicate the *weight* that each factor would carry. The provision of narrower versions of the offence, together with sentencing ranges and starting points within each bracket, could do much to promote a more consistent approach to sentencing, but there remains considerable leeway for magistrates to assess the effect of each aggravating and mitigating feature. Some offences (including theft) have a wide meaning and cover diverse types of behaviour. By distinguishing *types* (or forms) of the offence, the SGC has effectively created a larger number of more narrowly-focused offences which ought to be useful to sentencing judges and magistrates. At the same time, the Council's guidelines are still open to interpretation. What, exactly, constitutes "some planning" rather than "little planning" both of which are used by the SGC? Although the SGC offers an example of 'some planning' (committing a series of offences on the same day or where the offender goes equipped to steal), the sentencing courts will often have to use their own interpretation of these terms to decide which description best suits the offence before them, and there are no guarantees that each court will interpret the terms alike. Similarly, it will be left to the sentencing court to decide which of an offender's previous convictions (if any) are relevant to the immediate offence, and the level of the premium to be added to the sentence in order to reflect these.

For retail theft, the earlier guideline emanating from the Court of Appeal in *Page, Maher and Stewart*<sup>71</sup> focussed on non-violent, non-organised offending and set a maximum of two years' imprisonment for those offenders being sentenced on multiple counts of shop theft. In

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<sup>71</sup> [2004] EWCA Crim 3358

such instances the Court also ruled that sentences beyond 18 months will rarely be warranted. Even though the Court expressly excluded gang offending from the scope of its guideline judgment, it did make an obiter statement that where gang offending occurs repeatedly or on a large scale, sentencing of the order of 4 years may well be appropriate, even on a plea of guilty.”<sup>72</sup> The same figure has been set by the Council, albeit for a single offence rather than a series of offences. The overall sentencing range prescribed by the SGC for retail theft is aligned with the earlier Court of Appeal guideline judgment.

The main concern surrounding the Council’s guideline on shop theft is that the appropriate sentencing range (and therefore the ultimate sentence) depends chiefly on the level of intimidation, threats or use of force.<sup>73</sup> Indeed, the highest sentencing range prescribed by the Council (36 weeks to four years’ custody) is reserved for offences involving both group offending *and* a level of intimidation, threats or use of force significant enough to fall just short of robbery. But where an offence involves such a high level of force, it is likely to warrant a separate charge for an offence against the person. Knowing that violence is afforded such a significant role as aggravation for a theft offence, in cases where the offender contests the violence (or degree thereof) or where the Crown Prosecution Service has insufficient evidence to charge for the violent conduct, the prosecution may rely on the violence as an aggravating feature of the theft. In short, where the offender is alleged to have committed a theft involving violence, there is a danger that he may be sentenced on the basis of the violence even where the charge (and conviction) does not reflect this. The allocation of violence and intimidation as such a strong source of aggravation provides the prosecution with an effective alternative to securing a separate charge for violent conduct.

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<sup>72</sup> Ibid, paragraph 2

<sup>73</sup> See Table 1, *supra*

### 3.5 Aggravation and Mitigation in Theft Cases

In a rare example of empirical research into court sentencing practice, Flood-Page and Mackie identified a number of factors which were found to either increase or reduce the likelihood of a custodial sentence being imposed for theft.<sup>74</sup> In the magistrates' courts, custody was less likely to be imposed if the offender (i) had no previous convictions, (ii) was being sentenced for only one offence, (iii) was not subject to a court order at the time of the offence, (iv) had demonstrated remorse or offered to pay compensation to the victim, or (v) the offender was aged over 30.<sup>75</sup> The authors found a correlation between the decision to impose a custodial sentence where the opposite of each of these factors was true. That is, custody was more likely to be imposed where the offender had previous convictions, was being sentenced for more than one offence, was subject to a court order at the time of the offence, had not demonstrated remorse or offered to pay compensation to the victim, or where the offender was aged 30 or younger. Additionally, the offender was more likely to receive a custodial sentence where he was sentenced for theft of, or from, a vehicle or where other offences were taken into consideration.<sup>76</sup>

In the authors' sample of theft cases being sentenced before the magistrates' courts, 12 percent of all thefts resulted in a custodial sentence. Where the offender had no previous convictions, only two percent were imprisoned. This figure increased to 15 percent for offenders with one or more previous convictions of any type, and rose further to 17 percent for those with one or more previous theft convictions.<sup>77</sup> Without knowledge of other factors present in specific cases, from these figures it appears that the magistrates view prior history

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<sup>74</sup> The authors' analysis of the use of community sentences, fines and discharges did not separate cases by offence. Consequently, there was no analysis specifically for theft. The study's findings relating to these sentence types will not be considered further here.

<sup>75</sup> Flood-Page and Mackie (1998), at page 26

<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

as an important factor in determining the sentence, which may result in the decision to impose a custodial sentence. The custody rate for offenders with any previous convictions (15%) and previous theft convictions (17%) are surprisingly similar, suggesting that the type of conviction is not so important in the decision to imprison.

Flood-Page and Mackie found that custody was imposed in 42 percent of theft cases sentenced before the Crown Court. The authors found a negative correlation between the decision to imprison and (i) female offenders, (ii) offenders with no previous convictions for theft, (iii) mentally ill offenders, (iv) offenders who were not subject to a court order at the time of the offence, and (v) thefts involving goods valued £100 or less.<sup>78</sup> Conversely, custody was more likely to be imposed where the offender was male, or had one or more previous theft convictions, was subject to a court order at the time of the offence, or where the value of the goods stolen exceeded £1,000.<sup>79</sup> Unlike in the magistrates' courts, there was no correlation between the decision to imprison and offenders with previous convictions of any type. The Crown Court therefore appears to place greater importance on the similarity between the type of previous conviction and the nature of the immediate offence.

Prior to delivering its advisory guideline to the SGC, the SAP commissioned an empirical study to explore the practice of sentencing offenders convicted for retail theft in England and Wales.<sup>80</sup> In view of the fact that very little was known about sentencing for theft from a shop which could guide the SAP in its advice to the SGC, the SAP deemed it beneficial to commission the research to understand which factors influence the sentencing decision. The report was published in 2006, simultaneously with the SAP's consultation paper on sentencing for theft from a shop.

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<sup>78</sup> Ibid at page 84

<sup>79</sup> Ibid.

<sup>80</sup> Speed & Burrows (2006)

The report collected data on 1,563 thefts from shops where sentence was passed from late 2004 to early 2005; the same timeframe as for the cases included in this study. The study utilised a rank order analysis which ranks the severity of sentences according to type. Discharges are the least severe penalty, with fines being more severe than discharges. Community sentences are more severe than fines but less severe than custodial sentences. This reflects the sentencing hierarchy presented under the 1991 and 2003 Criminal Justice Acts. The most commonly imposed sentence type for shop theft was a community sentence, imposed in 32 percent of cases within the sample. Discharges and custody were imposed in similar numbers, 27 percent and 26 percent respectively. Fines were imposed in only 13 percent of cases.<sup>81</sup>

Using a chi-square test for the cross tabulation of variables, the study found a number of factors, either relating to the offence or the offender, which were statistically significant to the sentencing decision. Regarding the offence, there was a significant, albeit small, correlation between the sentence type and value of goods stolen. The courts were slightly more likely to impose a custodial or community sentence where the theft involved property valued at over £100.<sup>82</sup> Custody was the most likely outcome where the offence involved damage caused to property, with 41 percent of such cases resulting in imprisonment,<sup>83</sup> although the report did not suggest what constitutes damage or the extent of the damage in each case. Custodial and community sentences were more likely to be imposed in cases involving physical injury, particularly where that injury left a visible mark after the event.<sup>84</sup> Notwithstanding the fact that involving children in the commission of an offence is an aggravating factor, even where the child is not used but is aware that the offence is taking

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<sup>81</sup> Ibid, Table 4.3

<sup>82</sup> Ibid, Table 5.1

<sup>83</sup> Ibid, Table 5.3

<sup>84</sup> Ibid, Table 5.4



place,<sup>85</sup> the study conducted by Speed and Burrows on behalf of the SAP found that a discharge was the most likely outcome where the offender was accompanied by a child, and that custody was very rarely imposed in such cases.<sup>86</sup> However, courts may be reluctant to impose a custodial sentence where the offender is the sole carer of a child owing to the negative effects such a punishment would have on the child. The sentencing decision in such cases may be based more on the offender's circumstances and family life than on the seriousness of the offence.

Where there was evidence that the offender was under the influence of drugs at the time of the offence, there was a greater use of community sentences (including drug treatment and testing orders).<sup>87</sup> By association, the study found a higher than average use of custody and community sentences where drugs were the motivation behind the offending. Although not unheard of, discharges and fines were less likely to be imposed in such cases.<sup>88</sup>

On the issue of previous convictions, the Speed and Burrows study had found that custody was an unlikely outcome for first offenders except where other aggravating factors were present (such as high value of goods stolen).<sup>89</sup> Generally, the greater number of previous convictions amassed by the offender, the higher the sentence would be.<sup>90</sup> A discharge was imposed on 63 percent of first time offenders, compared with only 21 percent of offenders with six or more previous convictions.<sup>91</sup>

In their conclusions, Speed and Burrows highlighted seven factors which were most associated with the imposition of a custodial sentence. This was not a multivariate analysis:

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<sup>85</sup> See SGC (2008), page 17

<sup>86</sup> Speed & Burrows (2006) Table 5.5

<sup>87</sup> Ibid, Table 5.6

<sup>88</sup> Ibid, page 43

<sup>89</sup> Ibid, Table 5.8

<sup>90</sup> Ibid.

<sup>91</sup> Figures modified from *ibid*, Table 5.8

each of the seven factors was individually associated with a greater use of custody. The seven factors were, (i) receiving a custodial sentence for the offender's last conviction for theft from a shop, (ii) being remanded into custody, (iii) having no fixed abode, (iv) being labelled as a persistent offender, (v) being sentenced by a District Judge, (vi) being male, and (vii) being dealt with by the court at the same time for another offence.<sup>92</sup> It is interesting to note that none of these factors directly relate to the seriousness of the offence. The decision to remand an offender may be based on offence seriousness, but the information within the report did not make clear why each offender was placed on remand, and whether this decision was made due to the seriousness of the offence. Consequently, it would appear that the decision to imprison is, in some cases at least, based principally on matters other than the seriousness of the offence.

### 3.6 Abstracting electricity<sup>93</sup>

Under the Larceny Act 1916, which preceded the Theft Act 1968, stealing electricity was dealt with as a separate offence as electricity was not capable of being taken and carried away, a requisite of other forms of the offence.<sup>94</sup> Although the Theft Act 1968 does not require the taking and carrying away of property,<sup>95</sup> the provision of a separate offence for electricity was preserved by the Act, which created a new offence of abstracting electricity contrary to section 13. Owing to its purely intangible form, electricity "is excluded from the definition of stealing."<sup>96</sup> This position was endorsed in *Low v Blease*<sup>97</sup> where the Divisional

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<sup>92</sup> Ibid, page 59

<sup>93</sup> For a comprehensive analysis of the substantive law of abstractive, see Ormerod & Williams (2007) chapter 11.

<sup>94</sup> Section 1(1) Larceny Act 1911, "A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, *takes and carries away* anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof" (emphasis added).

<sup>95</sup> Rather the property must be appropriated.

<sup>96</sup> Criminal Law Revision Committee (1966), paragraph 85

<sup>97</sup> [1975] Crim LR 513

Court held that electricity was not capable of being appropriated, and so could not form the basis of theft. The implication of this is that burglary may be committed by a trespasser who lights a gas fire, but not by one who switches on an electric fire since gas is capable of being stolen, whilst abstraction of electricity is not one of the ulterior offences of burglary.<sup>98</sup>

According to section 13, abstraction is committed by a person who “dishonestly uses without due authority, or dishonestly causes to be wasted or diverted, any electricity...” The offence is triable either-way, carrying a maximum penalty of five years’ imprisonment. Traditionally, the courts have identified a need for deterrent sentencing for this offence,<sup>99</sup> and have more recently observed the seriousness of the offence.<sup>100</sup>

Unlike many property offences, abstraction of electricity has not been made subject of any guidelines emanating from the Court of Appeal or SGC. Neither did the offence feature in the Magistrates’ Association Sentencing Guidelines, although guideline entries for other offences may be influential to the magistrates when passing sentence for abstraction by offering starting points for other offences of perceived equal seriousness.

### 3.7 Conclusions

Although theft may not be frequently considered as one of the most serious offences within the criminal catalogue, the above discussion has demonstrated that it is far from a trivial offence, often satisfying the seriousness tests under the custody and community sentence

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<sup>98</sup> See Ormerod & Williams (2007), page 324

<sup>99</sup> *Hodkinson* (1980) 2 Cr App R (S) 331

<sup>100</sup> *Harrison* [2001] EWCA Crim 2427, at [6] per Rant J: “This is quite a serious criminal offence and not to be taken lightly. After all, law-abiding members of the public have to pay their public utility bills and some people, such as retired folk or lone parents, find difficulty in doing so because of their limited means.”

thresholds. That being said, thefts will also often attract lesser penalties within the financial and discharge bands.

Throughout this discussion it has become clear, in view of mode of trial guidelines, offence-specific guidelines and findings from sentencing practice studies, that theft in breach of trust is invariably viewed as the most serious form of the offence. But this measurement of seriousness does depend, of course, on other factors: theft in breach of a junior position of trust or thefts of low value are not marked as seriously as high value thefts or thefts by persons in senior positions. The seriousness of breach of trust cases depends greatly on the offender's position of trust and the value of the property stolen.

The recent sentencing guidelines issued by the SGC depict retail theft as the least serious form of the offence for which a specific guideline exists.<sup>101</sup> Nonetheless, custodial sentences are still imposed reasonably frequently, and the SGC makes provision for significantly lengthy terms of imprisonment where the offence is committed by an organised gang and involves intimidation or threats of violence.

All of this assumes that sentencers are following the letter of law, and are only imposing custodial and community sentences where the seriousness thresholds are satisfied. There may be, of course, an alternative explanation. Where an offender has a lengthy criminal history, his current offence may not be sufficiently serious to warrant a custodial sentence, but the courts have no choice but to impose a term of imprisonment. The offender may be unwilling to comply with a community order and may not have the funds to pay a fine. Consequently, the courts may consider custody to be the only realistic option available. In

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<sup>101</sup> Theft of a cycle may be less serious still, but no separate guideline exists for this subcategory of the offence.

some cases, the decision to imprison may be based principally on the offender's prior criminality and, perhaps, his failure to comply with previous court orders.

A similar conclusion was reached by a report commissioned by the Prison Reform Trust, which examined sentencing in 'cusp' cases (i.e. sitting on the borderline of the custody threshold). The authors found that in the majority of cusp cases, the decision to impose a custodial sentence was driven by the nature of the offence and/or the offender's previous convictions and failure to respond to earlier sentences, effectively ruling out non-custodial options.<sup>102</sup> By looking at cusp cases, this study focused on cases where the seriousness of the offence was sufficient enough to lead the court to at least *consider* custody. Nonetheless, in some cases, the ultimate decision to impose a custodial sentence was based on factors not relating to the seriousness of the offence.

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<sup>102</sup> Hough, Jacobson & Millie (2003), page 36

## **CHAPTER FOUR**

### **METHODS AND METHODOLOGY**

#### **4.1 Introduction**

This chapter will explain the methods and methodology employed in undertaking this study. As will be true for many research projects, during the course of the study, a few small problems presented themselves which necessitated slight changes to the scheduled research methods. These will be set out later in this chapter. Fortunately, subsequent opportunities for alternative methods also arose, which allowed for the focus and aims of the project to remain the same. Alterations were only made to the methods of data collection utilised. The sentencing decision in theft cases was always the focus of the research, although the methods employed to examine this were amended as the study progressed.

#### **4.2 Research aims and objectives**

The primary aim of the study is to assess the courts' construction of proportionality (both in terms of offence seriousness and sentence severity) in theft cases, and to assess the extent to which the courts draw upon other sentencing philosophies which may or may not be consistent with proportionality. Following this, the research moved to consider the extent to which there is evidence of the courts applying a consistent sentencing approach that is in line with the relevant principles and policies in cases of theft.

During the fieldwork, the researcher was located at the CPS Coventry office, whose workload feeds the Coventry courts, along with a small number of cases which are transferred to neighbouring court centres for efficiency purposes.<sup>1</sup> Consequently, the study focuses on sentencing practice within the Coventry Magistrates' and Crown Courts.

Owing to its very nature, a proportionality-based sentencing framework requires the measurement of offence seriousness and sentence severity. In order for this project to meet its aim, it was important to consider, both in practice and in theory, how these may be measured. Sentencing guidelines have long issued non-exhaustive lists of offence-specific aggravating and mitigating features, which affect the seriousness of the offence, but no guidance is offered to sentencers as to the weighting of each feature. The consideration of this became one objective of this project along with the extent to which there is an associated consistency amongst sentencers on the perceived weighting of various factors. An understanding of the perceived importance attached to various factors would facilitate a better appreciation of the measurement of the offence's seriousness.

These research aims and questions presented a number of possible methods to be used, including data collection through court and/or CPS files, direct observation in the courtroom, and/or by conducting interviews with decision makers and those linked to the decision making process (for example, probation officers as writers of pre-sentence reports). During the initial preparatory stages of the project, each of these methods was considered, although the direct courtroom observation was ruled out early on as being overly restrictive and insufficiently certain. In-court observation would offer no flexibility to the times (and pace) of the data collection, being as it is dependent on court workload. In addition, it is

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<sup>1</sup> Section 27A Magistrates' Courts Act 1980

conceivable that two or more courtrooms may hear theft cases during the same session, rendering it necessary for the researcher to select which case to observe, perhaps with no justification for choosing one over the other. Restrictions on public access to the Youth Court would also limit the scope of the project to consider adult offenders only. As the research project progressed, owing to the complexity of the sentencing decision and its associated processes, it became clear that no single method could be relied upon.

#### 4.3 Scope of the Project

For this project, the term ‘theft’ has been interpreted according to its meaning under section 1(1) of the Theft Act 1968 and, generally, only cases which fall under this section have been considered. Consequently, the project does not consider cases of, for instance, burglary with theft or robbery which require some action or circumstance additional to the committal of a simple theft. Robbery, for example, is a composite of theft with the threat or use of violence in order to steal. Since robbery is a violent offence, offenders will rightly be sentenced on different grounds to those convicted of theft owing, in part, to the fact that the seriousness of the offence of robbery is aggravated by the use or threat of violence. The project does, however, consider a very small number of cases of abstracting electricity contrary to section 13 of the Act. These cases were included since abstraction is, for all intents and purposes, the theft of electricity.<sup>2</sup> By looking also at cases of abstraction, it may be possible to shed light on the importance (at the sentencing stage) of the distinction between sections 1 and 13.

At the charging stage, theft is divided into several sub-offences, including theft from a shop or stall; from a dwelling; of a mobile phone; from the person; of a cycle; and theft by finding.

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<sup>2</sup> The reasons why electricity is subject to a separate offence are explained in section 3.6 above.



There was no apparent rationale for excluding any of these subcategories of the offence; so consequently, the project considers any type of theft, regardless of the category, providing that the charge (and conviction) fell under section 1 or section 13 of the 1968 Act.

For sentencing purposes, offenders in England and Wales can be divided into three broad categories: adult offenders (those aged over 18), young offenders (aged under 18) and those suffering from a recognised mental disorder. This categorisation is significant since different policies and aims apply to different categories of offender. In cases of young offenders, a greater emphasis is placed on crime prevention.<sup>3</sup> Moreover, for young offenders the courts have a distinct set of sentencing options at their disposal not available for other offenders. The referral order and the action plan order, for example, are only available to the courts when passing sentence on a young offender. The courts have a further set of sentences available when sentencing mentally disordered offenders, such as hospital and guardianship orders, both of which are found under section 37 of the Mental Health Act 1983, which are designed to ensure the wellbeing of the offender. Perhaps unsurprisingly, the sample of cases in this study included a considerable number of cases concerning young offenders (45 in the youth court and one in the Crown Court). In none of the cases sampled were any of the offenders treated as having a mental disorder. Although one offender (in two cases) did demonstrate signs of schizophrenia by claiming that voices in his head told him to commit the offences, he was nonetheless sentenced as a mentally competent offender. In order to provide a comprehensive analysis of sentencing practice, none of the three categories of offenders were expressly excluded from the sample. However, the intention was not to actively secure a sample from each of the three categories. Rather, the cases

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<sup>3</sup> S.37 Crime and Disorder Act 1998: "It shall be the principal aim of the youth justice system to prevent offending by children and young persons...[I]t shall be the duty of all persons and bodies carrying out functions in relation to the youth justice system to have regard to that aim." This aim is retained by s.142A Criminal Justice Act 2003, recently inserted by s.9(1) Criminal Justice and Immigration Act 2008.

within the sample were selected randomly by using the first 250 cases sentenced within the specified time period.<sup>4</sup>

There is however a noteworthy limitation to the project: it only considers the in-court sentencing of offenders convicted for theft. Consequently, the study does not include out-of-court disposals, which are becoming increasingly relied on.<sup>5</sup> Since November 2004, an offender caught committing retail theft of property with a value of less than £200 has been able to avoid a court hearing by accepting a Penalty Notice for Disorder (PND), carrying an £80 fine. This option is only available where it is deemed to be the most apposite disposal option, taking into account the interests of justice. Accordingly, it is not an appropriate measure for repeat or prolific offenders,<sup>6</sup> or for those known to be substance misusers.<sup>7</sup> Therefore it is clear that the suitability and imposition of PNDs are restricted. Indeed even if, *prima facie*, the criteria for imposing a PND are satisfied, an offender may still be prosecuted on one of two grounds: either because the offender wishes to have a court hearing rather than accept the offered penalty, or through the CPS exercising its discretion to prosecute in accordance with *The Code for Crown Prosecutors*. The study does not incorporate PNDs in its scope as these penalties do not count as a criminal conviction<sup>8</sup>; rather, they are akin to cautions and warnings: they are not sentences.

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<sup>4</sup> See below

<sup>5</sup> For retail thefts of less than £200 value, penalty notices for disorder were imposed on 21,997 occasions in 2005 (that being the first full year in which they were available for the offence). This figure rose year-on-year to 45,616 in 2008. See, Ministry of Justice (2010b), chapter 2.

<sup>6</sup> Home Office (2005), para. 6.20

<sup>7</sup> *Ibid*, at para 6.21

<sup>8</sup> Kraina & Carroll (2006)

## 4.4 Methods

In order to analyse the relevant principles and policies, it was necessary to consult the statutory provisions concerning general sentencing principles, along with reported cases which offer an interpretation of these provisions. Owing to the period of time in which sentence was passed in the project's sample of cases, the Acts most relevant to this study are the Criminal Justice Act 1991 and the consolidating Powers of the Criminal Courts (Sentencing) Act 2000. Most of the sentencing provisions contained within the Criminal Justice Act 2003 came into force on April 4<sup>th</sup> 2005,<sup>9</sup> and so did not apply to this study's sample of cases. The 2003 Act changed numerous aspects of the penal system which would not have had a bearing on the cases included in the study because, for the cases in the sample, sentence was passed before the 2003 Act was brought into force. The changes make it undesirable to consider cases sentenced under the 2003 Act alongside cases from the preceding regime.

## 4.5 Empirical work

As mentioned above,<sup>10</sup> the second arm of the overarching aim was to analyse a sample of recent cases in which the offenders had been sentenced for theft. In order to do this, data was collected from 250 cases where sentence was passed in either Coventry Magistrates' or Coventry Crown Court. The data was collected using Crown Prosecution Service's case files since they were readily accessible. As the case files were stored chronologically, recent case files could be easily identified without first knowing any details of the cases. Theft cases were then identified by sorting through all files within the CPS archive. The cases included

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<sup>9</sup> Criminal Justice Act 2003 (Commencement No. 8 and Transitional and Saving Provisions) Order 2005/950

<sup>10</sup> See section 4.2

in the sample were selected on the basis of the date on which sentence was passed, beginning at September 2004 and continuing until the desired total number of cases had been collected. Magistrates' Court case files are held locally at the CPS for one year. The data collection began in September 2005. An alternative approach would have been to use the courts' own files. This was preferable because the court files would include a copy of any pre-sentence report, where such a report had been ordered. However, due to the manner in which the courts' files are stored, the theft cases could not be identified without first knowing the names and dates of birth of the offenders, together with the trial date. It follows that the court files could not be used as an initial source for the first phase of data collection. CPS files were selected as a suitable alternative data source, at least for details on the offender, victim, offence and sentence.

A formal application was made to CPS Headquarters, with access being granted shortly thereafter. Following an initial meeting with local CPS staff, the researcher was given free and unobstructed access to the appropriate files for the magistrates' court. A desk amongst the victim support staff, which was conveniently located adjacent to the file archive room, was provided and the researcher was granted free licence to set his own agenda. Since unobstructed access to the case files had been granted, the researcher was able to conduct the data collection without causing undue interference to CPS staff.

CPS files pertaining to Crown Court cases are stored locally in CPS offices for a relatively short time before being relocated to central facilities in Sheffield. These files were identified by CPS workers using a computerised index of all Crown Court cases, and were transported back from Sheffield to Coventry for the purposes of this project. The number of Crown Court cases available was very small, but they were included for the purposes of pursuing a comprehensive range of cases.

The data collected from the CPS files was recorded in a specifically designed pro-forma. One pro-forma was completed for each case or, in cases with co-offenders, one per offender. The data collected fell into one of four broad categories, relating to: the offender (including age, gender, employment and previous convictions); the victim (including age, gender, vulnerability and relationship with the offender); the offence (including the presence of aggravating and mitigating features); and the sentence imposed.

For the sample of cases chosen, sentence was passed on the offenders between September 2004 and March 2005. These dates were selected for a number of reasons. Magistrates' case files are held at the CPS Coventry office for 12 months (six months for Crown Court cases) and are then either destroyed or sent into central storage. As a result, when the data collection began in September 2005, the earliest cases available were those decided in September 2004. It was felt that more reliable data could be collected from earlier cases since there would be less chance of a pending appeal against sentence, or indeed conviction. Since the relevant provisions of the Criminal Justice Act 2003 came into force on 4th April 2005, it was neither possible nor desirable to consider cases where sentence was passed under the 2003 Act's framework. To do so would effectively have split the sample between those sentenced under the 2003 Act and those sentenced under the pre-existing legislation (most notably the Criminal Justice Act 1991), rendering it impossible to draw any reliable comparisons between the two groups of cases due to the policy changes made under the 2003 Act (that is, the move away from a sentencing framework based primarily on proportionality to a regime incorporating both proportionality and crime-reduction models). Whether the 2003 Act has had a marked effect on sentencing practice is a separate issue.

A total of 250 cases were included in the sample. These were selected chronologically from the CPS Coventry Office's archive, starting with cases where sentence was passed in September 2004 and included all theft cases until the desired quantity (250) had been collected. As would have been expected, most of the cases within the sample were sentenced for in the magistrates' court. Of the 250 cases considered sentence was passed in Coventry Crown Court in 12 of them. In seven of these, the offender was committed to the Crown Court for sentence, having been convicted in the magistrates' court. The offenders' guilt was established in the Crown Court in only four cases. The one remaining Crown Court case was an appeal against the sentence. For the remaining 238 cases, sentence was passed in Coventry Magistrates' Court, or by the magistrates' court sitting as a youth court in cases with young offenders. The 12 Crown Court cases consisted of all theft cases sentenced by the Court between September 2004 and March 2005. The 238 magistrates' cases consisted of all theft cases heard by the court between September 1<sup>st</sup> 2004 and February 28<sup>th</sup> 2005; cases heard after February 2005 were not included as this would have taken the total number of cases in the sample beyond the desired number of 250. Although data was collected from 250 CPS case files, some cases had involved either single thefts committed by multiple offenders or multiple thefts committed by a single offender. These cases had to be divided to include a single theft committed by one offender. Consequently, two thefts committed by one offender or one theft committed by two co-offenders would each be separated into two cases. This exercise effectively increased the number of cases by 42 to a total of 292.

As mentioned above, the intention when collecting data from the CPS files, was to record data from 250 cases. This was done by taking each theft case in chronological order until all 250 cases had been accrued. There were a few cases identified that were not suitable for inclusion in the study. In a small number of cases the offender was originally charged for theft, that charge later being amended to a non-section 1 offence (for example, where theft of

a motor vehicle might be altered to a charge of taking a motor vehicle without consent). Since the sentence passed upon conviction or guilty plea is not in reference to a theft charge (even where the action might properly amount to theft), these cases were excluded from the sample. One further notable case was excluded from the sample: a Crown Court case where no note relating to the sentence imposed had been included in the CPS file, rendering the case inappropriate for inclusion in the study.

Much of the data collected from the CPS files was numerically coded and subjected to quantitative analysis using SPSS (version 14). However, since the data contained within the CPS files focuses mainly on the prosecution of the defendant rather than the sentence, it was desirable to seek further data purely relating to the sentence imposed. For this, it was hoped that the courts' case files could be used. Having completed the data collection from the CPS, the appropriate cases had been identified, thereby providing the means to locate the corresponding court files. It was envisaged that the court files could provide additional material on the sentencing process by viewing the sentencing reasons form and any pre-sentence reports (PSR) contained within. A formal request was made to Her Majesty's Court Service (HMCS), but was turned down on two grounds. Firstly, concerns were raised over the confidentiality of the reports' sensitive data and respect for the anonymity of the report writer. Secondly, HMCS were not convinced that they themselves had the right to grant access to the PSRs as it was believed by them that the courts were merely custodians of the reports, which remained the property of West Midlands Probation. Probation, on the other hand, was unwilling to grant access as they believed the PSRs, as court-ordered reports, were the property of the courts. Consequently, neither HMCS nor West Midlands Probation was willing to allow access to the court files.

## 4.6 Interviews

HMCS and West Midlands Probation did, however, offer to consider a request to interview a small number of magistrates, judges and probation officers who work within the Coventry courts. Whereas the interviews with probation officers were a subsequent inclusion within the study, the interviews with sentencers had always been a scheduled aspect of the project. Conducting these interviews allowed for a further analysis of sentencing practice by explaining in more detail how courts sentence thieves, and the aims and philosophies which underpin these practices. Unlike the factual data collection from the CPS case files, the interviews acted as a direct source for understanding the core philosophies applied by the judges and magistrates. The specific issues covered were shaped, to a large extent, by the findings from the earlier empirical work. The questioning began by asking the magistrates and judges about the purposes of sentencing in theft cases, and their views of pre-sentence reports and the extent to which the sentence recommendations contained within are followed by the courts. Questions then moved on to consider the courts' sentencing powers and the occasions in which various types of sentence may be imposed. Interviewees were also asked about the importance of various mitigating and aggravating factors which may impact on the choice of sentence imposed. These include factors relating to the offence (such as planning, the value of the property stolen, the victim's vulnerability and whether the offence was committed on bail) which act to increase or reduce the seriousness of the offence. Questions were also asked concerning offender mitigation, the impact of a guilty plea, and the role of previous convictions and sentences. Magistrates were asked about their opinions and utilisation of the sentencing guidelines made available to them to aid in the understanding of apparent consistencies and inconsistencies in sentencing.



Interviews with sentencers were held in the appropriate court buildings. In total ten sentencers were interviewed. Since the majority of theft cases are heard before the lower court, most of the interviews were conducted with those who pass sentence in the magistrates' court, with seven lay magistrates and one District Judge (Magistrates' Court). Only two Circuit Judges were available for interview, but since such a small number cases within the sample were sentenced in the Crown Court, this was felt to be an adequate representation of sentencers from the higher court. All interviewees were self-selected having volunteered to be interviewed.

The interviews, which lasted for between 30 and 55 minutes, were voice-recorded and then transcribed. The data obtained from them was analysed qualitatively and without recourse to computer software, so that an accurate account of the interviewees' comments could be made.

For magistrates and judges, the interviews took place during court recess between the morning and afternoon session. The only magistrates available had either sat in court on a morning bench and had remained at the court after the session had ended, or those magistrates who were due to sit in the afternoon and had arrived at court early.

Generally, it is preferable to conduct meetings with interviewees individually, particularly where the purpose of the interview is to uncover individualised responses which reflect an individual's opinions. Nevertheless, occasionally it becomes necessary to undertake joint interviews, which may cast doubt on the truth of an interviewee's responses if they fear disagreeing with the co-interviewee, or if they have no opinion on a matter but would rather offer the same opinion as others rather than provide no response at all. On one occasion, the morning court session had overrun, reducing the time available to conduct interviews before

the commencement of the afternoon session. Consequently, there was insufficient time to conduct two separate interviews, resulting in Magistrates Two and Three being interviewed together. The two Crown Court Judges were also interviewed together due to constraints on their own time.

Unlike the interviews with sentencers, interviews with probation officers were not an originally scheduled part of the study. Rather they were conducted as an alternative to accessing the PSRs. As the authors of pre-sentence reports, the contents of which might be taken into consideration by the court at the sentencing stage, it was felt that the interviews would offer a useful addition to the study by providing a further perspective on the determination of sentence and the importance of various factors. A formal request to West Midlands Probation was duly submitted and eventually granted, although concerns over the demands placed on the probation officers' time meant that an initial run of only six interviews could be scheduled. The semi-structured interviews took place in July 2009, with one additional interview being arranged and conducted in October 2009, were to some extent an extension to earlier interviews with magistrates and judges. Having asked the magistrates and judges about their sentencing practices and upon finding that the magistrates were often willing to follow any recommended sentences suggested to them by the Probation Service, it was important to establish the extent to which the views of probation officers (as reflected in their reports presented at court) were in line with those of the sentencers themselves.

#### 4.7 Practical Constraints

The current chapter has highlighted two practical constraints which arose during the course of the study, leading to some research methods being abandoned or replaced with alternatives. Firstly, it had been envisaged that court files could be used as primary data sources. However, access problems became apparent early on in the project. Court files, whilst stored locally, are archived according to defendant surname, without which the appropriate files could not be identified. The focus then shifted to the potential use of CPS files, which, it was anticipated, would contain broadly the same information as the court files, albeit without a copy of any PSR. This offered the only suitable alternative to the use of the court files.<sup>11</sup>

The second practical constraint arose upon making a subsequent request to access the court files for the purpose of viewing the PSRs contained within.

The request was met with opposition by Her Majesty's Court Service on the grounds of data protection and ensuring the anonymity of the reports' authors. Moreover, questions were also raised as to whom the reports belonged: the Court Service claimed they were the property of West Midlands Probation, whereas the latter claimed the opposite. This uncertainty over ownership meant that permission to view the reports would not be forthcoming. After considerable and lengthy discussions with the authorities, it was decided that any further attempts to access the court files would not be fruitful. The request was subsequently abandoned. This led to a further reconsideration of the methods to be employed. Consequently, the series of interviews with probation officers were conducted as an alternative to accessing the PSRs. Despite these problems, the aims and scope of the

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<sup>11</sup> Courtroom observation was also an alternative but its restrictive nature proved undesirable.

project remained unchanged. As each methodological challenge arose, alternative opportunities presented themselves, facilitating the continuation of the study as anticipated.

## **CHAPTER FIVE**

### **IMPACT OF OFFENCE CHARACTERISTICS AND PROCEDURAL ISSUES ON THE SENTENCING DECISION**

This chapter analyses various offence-related factors and explores how these appear to impact on the sentencing decision. The Criminal Justice Act 1991, as consolidated in the Powers of the Criminal Courts (Sentencing) Act 2000 (hereafter PCCSA), required the courts to impose custodial and community sentences only on the basis of offence seriousness. To the extent that this legislative guidance is upheld by the courts, this chapter may be expected to reveal various factors which might influence the sentencing decision.

In addition to offence-related factors, the chapter also explores the apparent importance of a number of features surrounding the offence, including the sentencing venue (be it the magistrates' court or Crown Court), any other offences for which the court simultaneously passes sentence, and the impact of guilty plea.

#### **5.1 Sentencing Court**

Table 5.1 shows the number of offences for which different sentences were imposed in the magistrates' court and Crown Court. It details only the most severe penalty in each case based on the sentencing hierarchy under the Criminal Justice Act 1991. For example, if an offender was sentenced to a community rehabilitation order as well as being ordered to pay

compensation and costs, only the CRO is counted here. The table shows that the magistrates' court utilised a wider range of sentencing options than the Crown Court (explainable by the fact that the Crown Court heard only 14 cases) although both rely on the use of immediate custody more than any other sanction. This is perhaps not surprising in relation to the Crown Court cases, but it is less obvious for cases dealt with in the magistrates' court.

13 of the 14 Crown Court cases were either committed for sentence or referred to the Crown Court for trial. The remaining case was an appeal against sentence imposed by the magistrates' court. Predictably, the Crown Court was significantly more likely to impose a term of immediate imprisonment than the magistrates' court, with 11 cases (78.6%) sentenced by the higher court receiving an immediate custodial sentence compared with 67 (24.1%) in the magistrates' court. This is almost certainly explained by the fact that the Crown Court hears more serious cases and sentences accordingly. On the other hand, the fact that sentence is passed in the Crown Court does not necessitate the imposition of a sentence beyond the magistrates jurisdiction. Two Crown Court cases resulted in the imposition of a non-custodial sentence. In case 280, the Court imposed a two-year CPRO and six-month curfew upon an offender following an early guilty plea for stealing confectionary valued £21.50 from a newsagent. In case 289 the offender had appealed against the terms of a five-year CRASBO imposed by the magistrates for stealing confectionary worth £8. The appropriate clause, which had prevented the offender from accessing his home address, was amended by the Crown Court, but the order was otherwise upheld.

**Table 5.1 Sentence Type and Court**

			Court		Total
			Magistrates' Court	Crown Court	
Sentence Type	Immediate custody	N.	67	11	78
		%	24.1%	78.6%	26.7%
	Suspended sentence	N.	2	1	3
		%	.7%	7.1%	1.0%
	Detention Training Order	N.	4	0	4
		%	1.4%	.0%	1.4%
	CRO	N.	39	0	39
		%	14.0%	.0%	13.4%
	CPO	N.	4	0	4
		%	1.4%	.0%	1.4%
	CPRO	N.	6	1	7
		%	2.2%	7.1%	2.4%
	DTTO	N.	35	0	35
		%	12.6%	.0%	12.0%
	Curfew	N.	5	0	5
		%	1.8%	.0%	1.7%
	Attendance Centre	N.	1	0	1
		%	.4%	.0%	.3%
	Supervision Order	N.	14	1	15
		%	5.0%	7.1%	5.1%
	Fine	N.	31	0	31
		%	11.2%	.0%	10.6%
	Discharge	N.	41	0	41
		%	14.7%	.0%	14.0%
	Referral Order	N.	20	0	20
		%	7.2%	.0%	6.8%
	Reparation Order	N.	2	0	2
		%	.7%	.0%	.7%
	CRASBO	N.	1	0	1
		%	.4%	.0%	.3%
	Costs	N.	1	0	1
		%	.4%	.0%	.3%
	Compensation	N.	5	0	5
		%	1.8%	.0%	1.7%
Total		N.	278	14	292
		%	100.0%	100.0%	100.0%

Chi-square = 31.172 Df = 16 P= 0.013

In seven cases (involving three offenders), the Crown Court imposed custodial sentences outside of the magistrates' jurisdiction. The offender in cases 282-284 pleaded guilty to two counts of theft from a dwelling, one count of theft from a machine and one count of obtaining by deception, having stolen bank cards belonging to two elderly victims who were under the offender's care. The cases therefore involved a breach of trust. She had withdrawn funds from one of the accounts, and fraudulently used the other card to purchase goods from a shop, purporting to be the cardholder. She had no previous convictions and was sentenced to 18 months' imprisonment for each offence, ordered to run concurrently. In cases 286-288, a 25 year-old male offender with 64 previous convictions, including 30 thefts, was sentenced to a total 26 months' imprisonment for three counts of shoplifting, two counts of breaching a conditional discharge, and single counts of a public order offence and failing to surrender to bail. In case 286, he had stolen clothing valued £280 from a shop and was shortly after detained whereupon he admitted the offence. In case 287, the offender stole spirits valued £70, was detained at the scene but did not admit the offence until his appearance in court. The offender again stole spirits valued £88 in case 286. Upon being challenged by staff, he became violent and was thereby charged with an offence contrary to section 4 of the Public Order Act 1986. The final case in which the Crown Court imposed a custodial sentence beyond the magistrates' powers was case 292, involving an offender who had pleaded guilty to theft by an employee and false accounting, having appropriated £27,600 from his employer in apparent breach of trust, was ordered to serve concurrent sentences of 12 months' imprisonment for each offence.

Cases sentenced before the Crown Court were less likely to involve low-value goods and may therefore be regarded as more serious, although attention must again be drawn to the small number of cases dealt with by the higher court. 72.3 percent of magistrates' court cases in the sample involved thefts where the value was below £100, compared to 50 percent



(seven cases) of Crown Court cases. Relatively few cases before the magistrates' court (12.2 percent) involved property exceeding £250 in value compared with 42.9 percent (six cases) of the Crown Court sample. Two of the three cases within the sample involving property of a value exceeding £5,000 were dealt with by the Crown Court.<sup>1</sup> Various aggravating factors, including thefts committed by organised groups or offences involving children, were not present in any of the Crown Court sample but were present within the magistrates' sample.

Although the number of Crown Court cases is too few to provide any definitive conclusions regarding the sentencing venue, it appears that the value of the property stolen and the position of trust placed on the offender may influence the magistrates' decision to decline jurisdiction.

## 5.2 Type of Theft

Table 5.2 shows the frequency with which each type of sentence was imposed for the various categories of theft. Within this section, each category of the offence is considered in turn.

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<sup>1</sup> The only magistrates' court case involving property valued greater than £5,000 was case 276 in which an 18 year-old white male with eight previous convictions, including two for theft, was handed a two year CPRO for theft of a vehicle valued £15,000 and theft of car keys. He had entered an office and opportunistically stolen the set of car keys which had been left unattended. He admitted to returning the following day to steal the car. The property was recovered.

Table 5.2 Sentence Type and Offence

		Offence (Theft)												Total
		from shop	from vehicle	of vehicle	from person	by employee	Abstraction	from dwelling	from a machine	by finding	of bicycle	of mobile phone	Other theft	
Sentence Type	Immediate custody	N 55	8	1	2	3	0	2	2	1	0	3	1	78
	%	24.8%	47.1%	33.3%	28.6%	50.0%	.0%	22.2%	66.7%	50.0%	.0%	75.0%	6.7%	26.7%
Susp sent.	N	2	0	0	0	0	0	1	0	0	0	0	0	3
	%	.9%	.0%	.0%	.0%	.0%	.0%	11.1%	.0%	.0%	.0%	.0%	.0%	1.0%
DTO	N	4	0	0	0	0	0	0	0	0	0	0	0	4
	%	1.8%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	1.4%
CRO	N	31	3	0	0	0	0	1	0	0	1	0	3	39
	%	14.0%	17.6%	.0%	.0%	.0%	.0%	11.1%	.0%	.0%	50.0%	.0%	20.0%	13.4%
CPO	N	1	0	0	1	2	0	0	0	0	0	0	0	4
	%	.5%	.0%	.0%	14.3%	33.3%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	1.4%
CPRO	N	3	1	1	0	0	0	1	0	0	0	0	1	7
	%	1.4%	5.9%	33.3%	.0%	.0%	.0%	11.1%	.0%	.0%	.0%	.0%	6.7%	2.4%
DTTO	N	35	0	0	0	0	0	0	0	0	0	0	0	35
	%	15.8%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	12.0%
Curfew	N	2	0	0	0	0	0	0	0	0	0	0	3	5
	%	.9%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	20.0%	1.7%
ATO	N	0	0	0	0	0	0	0	0	0	0	0	1	1
	%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	6.7%	.3%
Supervision	N	11	0	0	0	0	0	1	1	0	0	1	1	15
	%	5.0%	.0%	.0%	.0%	.0%	.0%	11.1%	33.3%	.0%	.0%	25.0%	6.7%	5.1%
Fine	N	23	2	0	2	1	1	0	0	1	0	0	1	31
	%	10.4%	11.8%	.0%	28.6%	16.7%	50.0%	.0%	.0%	50.0%	.0%	.0%	6.7%	10.6%
Discharge	N	36	1	0	0	0	1	0	0	0	1	0	2	41
	%	16.2%	5.9%	.0%	.0%	.0%	50.0%	.0%	.0%	.0%	50.0%	.0%	13.3%	14.0%
Referral Order	N	14	0	1	2	0	0	2	0	0	0	0	1	20
	%	6.3%	.0%	33.3%	28.6%	.0%	.0%	22.2%	.0%	.0%	.0%	.0%	6.7%	6.8%
Reparation Order	N	2	0	0	0	0	0	0	0	0	0	0	0	2
	%	.9%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	.7%
CRASBO	N	1	0	0	0	0	0	0	0	0	0	0	0	1
	%	.5%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	.3%
Costs	N	1	0	0	0	0	0	0	0	0	0	0	0	1
	%	.5%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	.3%
Comp.	N	1	2	0	0	0	0	1	0	0	0	0	1	5
	%	.5%	11.8%	.0%	.0%	.0%	.0%	11.1%	.0%	.0%	.0%	.0%	6.7%	1.7%
Total	N	222	17	3	7	6	2	9	3	2	2	4	15	292
	%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

Chi-square = 230.377 Df = 176 P= 0.004

### 5.2.1 Theft from a shop

Retail theft constituted 76 percent of the cases within the sample and was thus by far the most common type of theft presented. Custodial sentences (comprising of immediate imprisonment, detention and training orders, and suspended sentences) were imposed in 27.5 percent of thefts against retailers, 37.4 percent resulted in community-based sentences, whilst financial penalties were imposed in 11.3 percent of cases, and 16.2 percent were discharged. Immediate imprisonment was the most commonly imposed sentence, arising in 55 (24.8 percent) shoplifting cases. Immediate imprisonment was also the most commonly imposed penalty in the sample overall, albeit only in a minority of cases.

Many retail thefts (123 of the 222 shopliftings in the sample) occurred under common circumstances: the offender would enter the store, select the goods (usually of a modest value), conceal the property and attempt to leave the shop without offering payment. The offender would then be detained at the scene, where the property would be recovered and the offender would admit the crime.<sup>2</sup> Whilst these offences may commonly have been planned they would otherwise lack many of the sources of aggravation found elsewhere within the sample. For example, the value of the property was usually below £100 (82.9 percent), a fact which may provide a source of mitigation, and in only 4.5 percent of cases did the property exceed £250. The property was recovered in 83.8 percent of shopliftings, thereby reducing the financial losses incurred by the victim. It was quite rare for the offences to involve damage caused to other property; an aggravating factor present in only 7.2 percent of thefts against retailers. Overall, this general lack of aggravation may explain why only just over one quarter of retail thefts in the sample resulted in a custodial sentence.

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<sup>2</sup> These offences are hereafter described as 'typical shopliftings'

Thefts against shops accounted for 74.5 percent of thefts committed by young offenders within the sample, which explains the relatively high incidence of referral orders and supervision orders imposed for shoplifting; 70 percent of referral orders and 73.3 percent of supervision orders were imposed for retail theft. DTTOs were only imposed for shoplifting. Although DTTOs were not imposed in all cases committed by drug addicts who stole to fund their dependencies; of the 58 cases in which the motive was known to be drug related, 55 were shopliftings. The infrequency with which drug addicts would commit other forms of theft explains why all DTTOs were imposed for thefts committed against retailers.

#### 5.2.2 Theft from a vehicle

17 cases concerned thefts from a vehicle, eight of which (47.1 percent) resulted in the imposition of a custodial sentence and a further four (23.5 percent) resulted in a community-based sentence.<sup>3</sup> Consequently, the majority of offences falling within this category were regarded as sufficiently serious to cross the community sentence or custody thresholds, with only five cases (29.4 percent) resulting in either a financial penalty or a discharge.<sup>4</sup>

Thefts from vehicles commonly involved the offender stealing goods (often audio equipment) of a value greater than £100. This is in addition to the extent of any damage caused (as occurred in eight case), which together could lead the court to view offending of this sort as particularly serious. Additionally, in a large minority of cases (41.2 percent) the property was known not to be recovered, thereby increasing the harm caused to the victim.

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<sup>3</sup> In Flood-Page & Mackie (1998) theft from a vehicle was the most likely subcategory of theft to result in a custodial sentence; at page 25.

<sup>4</sup> Although a discharge was imposed in case 037 in which the offender was at the time serving 5 years' imprisonment for an unrelated burglary. The decision to discharge the offender absolutely may have been made on the basis that the court believed it to be unnecessary to impose any additional punishment.

### 5.2.3 Theft of a vehicle

Theft of a vehicle might be considered to be one of the more serious forms of theft owing to the value of the property and the potential for great inconvenience and intrusion upon the victim. Three such cases were included in the sample. Cases 091 and 093 concerned two co-offenders, a 22-year-old and 17-year-old white male, who pleaded guilty to the theft of a car valued at £600. It was not known whether the property was recovered. The former offender had 42 previous convictions including 10 for theft and was sentenced to five months' imprisonment.<sup>5</sup> The latter was made the subject of a three month referral order. Since the offender had pleaded guilty and had no previous convictions, the court was obliged to impose a referral order unless it considered imposing a custodial sentence. The fact that it decided not to do so (whilst imposing custody on the other offender) suggests that either the custody threshold is set higher in relation to young offenders, or that the offence did not cross the custody threshold and that the adult offender in case 091 was imprisoned either due to his previous convictions or on the basis of the totality of his offending behaviour.

The offender in case 276, an 18 year old white male with eight previous convictions, including two for theft, was handed a two year CPRO for theft of a vehicle and theft of car keys.<sup>6</sup> He had entered an office and opportunistically taken a set of car keys left unattended. He admitted to returning the following day to steal the car. The property was recovered.

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<sup>5</sup> This offender was also sentenced for driving whilst disqualified, theft from a vehicle (both 5 months' imprisonment concurrent to the theft), and using a vehicle without insurance (no separate penalty).

<sup>6</sup> The latter, case 277, was charged as 'theft: not otherwise coded'.

#### 5.2.4 Theft from the person

Thefts from the person occurred in seven cases and were committed exclusively by offenders aged under 30, including two young offenders both of whom were made subject to referral orders. Of the remaining five cases, two resulted in a custodial sentence, one offender received a community-based penalty, and two were fined. Where known, the value of the goods was low (below £20 in four cases), with only one (141) offence involving property valued in excess of £100. The offender had stolen a purse valued £162 which had been left in an ambulance by a paramedic whilst she escorted a patient into hospital. The offender had 27 previous convictions, 13 of which were for theft, and received a four-month custodial sentence. The act of targeting a member of the emergency services may have been considered by the court as a significant aggravating factor. Offenders commonly pleaded guilty (as occurred in 85.7 percent of cases), although this appears in two cases to have been part of a plea bargain in which the offenders had initially been arrested for robbery.

#### 5.2.5 Theft by an employee

Thefts committed by employees will often involve breaching a position of trust, and may therefore be regarded as one of the more serious forms of theft. Instances of theft by an employee arose in only six cases, three of which resulted in a term of immediate imprisonment. Case 292 was the only theft by employee case to reach the Crown Court. The offender, a 30 year old Asian male, was employed as a manager at a large DIY store. Over a fourteen month period, he authorised a number of cash refunds or refunds made onto his debit card for purchases not made. The total value of funds appropriated was a little over £27,600. The offender, who had a clean prior record, admitted the offences were motivated

by greed and also entered a guilty plea for false accounting. He was sentenced to 12 months' imprisonment for theft, and 12 months' concurrent for false accounting. Custodial sentences were also imposed on the offender in cases 060 and 061, concerning a 20 year old white female with seven previous convictions, including three for theft as well as cautions for shoplifting and criminal damage. On the first day of her employment in the shop, the cash registers were down £138.63. Two days later, the next occasion that the offender was working, the registers were again markedly short by £166.65. Upon being searched by the police, the offender's purse was found to contain £155 at which point she fully admitted taking the money. The magistrates sentenced her to three months' imprisonment for each count to run consecutively.

Cases 114 and 115 both involved a 30 year old white male offender with no previous record, who pleaded guilty to misappropriating £1,800 from a company account over a number of transactions. The magistrates imposed a 150-hour CPO and ordered the offender pay £1,542 compensation (equal to the funds taken in case 114) and costs. The sentence may have reflected the seriousness of the offence, whilst the offender's clean prior record may have deterred the court from imposing a custodial sentence. The only theft by an employee not to result in a custodial or community sentence was case 210 in which the offender, who was employed as a warehouse man, attempted to leave the works' premises two hours before the end of his shift. He was stopped by security staff and found to be concealing a DVD player and accessories valued at £250. He fully admitted stealing the goods with a view to selling them on. The offender had four previous convictions, only one for theft, which were all at least two years old. He was fined £100 and ordered to pay costs.

### 5.2.6 Theft from a dwelling

Nine cases in the sample concerned thefts from a dwelling, two of which involved young offenders who received referral orders for their offences. Of the remaining seven cases, three resulted in a custodial sentence (including one suspended sentence), a further three were dealt with in the community, and one was ordered only to pay compensation and costs. Custody was only imposed in those cases heard in the Crown Court. Dwelling thefts often involved relatively high-value goods, with the property value exceeding £100 in six of the nine cases, and exceeding £300 in four of these. Indeed one case (281) involved the theft of a £10,000 diamond ring which resulted in the imposition of a suspended sentence. These cases were also likely to involve vulnerable victims, including cases 282 and 283 (where the offender had stolen two bank cards belonging to elderly victims for whom the offender acted as a carer), and cases 006, 013 and 179 in which each offender had stolen property belonging to an unsuspecting family member.

### 5.2.7 Theft from an automatic machine or meter

Two out of the three thefts from an automatic machine or meter resulted in the courts imposing a custodial sentence. The only case of this type that did not attract custody was case 247 where the young offender entered a self-service laundrette, broke into five washing machines and stole £5 from the moneyboxes within, causing significant damage to the machines. The offender was handed a 12 month supervision order, a three month curfew order and told to pay compensation of £205 to reflect the value of goods stolen and the associated damage caused. Under not altogether dissimilar facts, in case 263 the police were called to a public telephone box following the activation of its alarm. The moneybox was



found to have been removed. The offender, a 32-year-old male with 105 previous convictions including 22 for theft, was seen in the area carrying a bag containing £267.10 in coins. He was also found to be in possession of a lock-knife and was thereby also charged with going equipped for theft. Having pleaded guilty, he was sentenced to serve three months' imprisonment for theft, with a concurrent three month term for going equipped. The decision to imprison the offender may have been influenced by the value of the goods stolen, the related damage (estimated at £275), the offender's lengthy record and the apparent planning behind the offence.

The theft from a machine in case 284 was one of five charges for which the offender was sentenced.<sup>7</sup> The offender, a 21 year old African-Caribbean female with no previous convictions, was employed by a local agency to care for the elderly. She had stolen bank cards belonging to two elderly victims, whom she was charged to care for. The offender had used one of the bank cards to withdraw £300 from an automatic teller machine; the basis of the charge in this case. She had admitted all charges and was sentenced by the Crown Court to 18 months' imprisonment for each of the first four charges, to run concurrently and five months' imprisonment concurrent for the charge of possession of a false instrument. Upon viewing the totality of the offending, no doubt the Court was of the opinion that the seriousness of the offending rendered a significant period of imprisonment the only appropriate response.

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<sup>7</sup> The offender was also sentenced for two counts of theft from a dwelling, obtaining property by deception, and being in possession of a false instrument (namely a counterfeit passport). Cases 282 and 283 relate to the two counts of theft from a dwelling.

### 5.2.8 Theft by finding

Theft by finding was one of the least common subcategories of theft present in the sample, appearing only twice. Case 069 concerned the theft of two pieces of gold jewellery by finding. The goods, valued £650, had been placed on display at a local art gallery. Unfortunately, the CPS case file did not explain how or where the offender had acquired the goods. The offender, a 39 year old white male with 67 previous convictions including 15 for theft, was arrested when he attempted to sell the jewellery to a pawn broker. He entered a guilty plea and was sentenced to two months in custody explicable perhaps by reference to the value of the property and the offender's prior record. Case 139 concerned a 25-year-old male offender who had found a bank card on a railway station platform. Subsequently, whilst on the train the offender dropped the card, asked the warden if he had found a card but when asked the offender was unable to identify the name shown on the card. The warden refused to return the card to the offender and he was arrested. He entered a guilty plea for theft and was handed a £250 fine. The court here had taken a less serious view of the offending, perhaps due to the fact that the bank card had not been used to make fraudulent purchases or appropriate funds from the cardholder's account since he had not had an opportunity to do so. As such, no real financial loss had been suffered other than the costs to the issuer of replacing the card.

### 5.2.9 Theft of a bicycle

Theft of a bicycle was another uncommon subcategory of theft, appearing only twice in the sample. It is the only subcategory of theft not to attract a custodial sentence.<sup>8</sup> Case 007 involved a 35 year old white male with 51 previous convictions, including seven for theft, who stole a bicycle to the value of £260 belonging to an adult female victim. The offender had admitted the offence and the property was recovered. At the same hearing the offender was also sentenced for theft of electronics valued at £350 from a dwelling. Despite the relatively high value of the goods and the offender's criminal history, the seriousness of the offending on totality was not deemed sufficient to deserve a custodial sentence. The offender was ordered to undertake a 12-month CRO. In case 175 the victim, a 16 year old white male, had left his bicycle unlocked outside a shop whilst he went to make a purchase. Upon leaving the store, he found his bike was missing and had been replaced by a second bike. The offender, a 28 year old male, was identified on CCTV. Upon arrest, he fully admitted taking the bike claiming he took it as it was in better condition than his own. The property was subsequently stolen from the offender so was not recovered. The offender had one previous conviction (for shoplifting eight years earlier) and a caution for a similar offence in 2004. He was handed a 12 month conditional discharge and ordered to pay £50 costs and £100 compensation, reflecting the value of the bicycle.

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<sup>8</sup> Abstraction of electricity similarly was dealt with by non-custodial means in all cases, but is not technically a form of theft.

### 5.2.10 Theft of a mobile telephone

Four cases involved an offender being sentenced for theft of a mobile telephone,<sup>9</sup> three of which resulted in the offender being sentenced to a period of immediate imprisonment. Case 040, the only incident of theft of a mobile phone by a young offender, involved the offender stealing a mobile telephone to the value of £300 from his school teacher whilst the victim was out of the room. Upon his return to the classroom, the victim spotted the offender standing at the teacher's desk and soon after found his mobile telephone was missing. The offender admitted stealing the phone, claiming it was an opportunistic offence. He was sentenced to a 12 months' supervision order.

Case 203 concerned a 24 year old male who stole a mobile telephone to the value of £50. The offender was seen in a snooker hall asking the patrons for money. One customer, the victim, noticed his mobile phone was missing and followed the offender outside. Initially the offender denied any wrongdoing, but subsequently admitted taking it, claiming he was only borrowing it. He entered a plea of not guilty and was sentenced to six weeks' imprisonment. Cases 290 and 291 concerned the same offender, an 18 year old Asian male, who stole two mobile telephones - valued £300 and £100 - on the same day. In the first count, the offender had enticed the 16-year-old victim into parkland and asked if he could borrow his mobile telephone. Once the victim had agreed, the offender refused to return the property to the owner and made threats toward the victim that he was carrying a knife.<sup>10</sup> On the same day, the offender had entered a take-away restaurant, the workplace of the second victim, noticed that the mobile telephone had been left unattended, took it and ran off making good his escape. He was subsequently arrested five days later and, following not guilty pleas, was

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<sup>9</sup> Case 003 factually involved the theft of a mobile phone belonging to the childminder of the offender's child. The offender was charged and subsequently sentenced not for theft of a mobile phone, but rather for theft from a dwelling other than an automatic machine or meter.

<sup>10</sup> Although the offence was charged as theft, the use of threats may have alternatively given rise to a charge for robbery.

sentenced by the Crown Court to a total of three months' imprisonment. Separate sentences for each count were not indicated. Even if it is true that the courts take a severe view of offending of this type, the decision to imprison may have been heavily influenced by the totality of the offending and the fact that the offender had made threats toward the victim, rendering the offence akin to robbery.

#### 5.2.11 Other thefts

In 15 cases the offenders were charged with a theft not falling into one of the other categories given, the charge being listed as "theft: not otherwise coded". Usually there was no alternative theft subcategory into which the offence would fit, although case 256 concerning an offender who stole electronic goods valued £100 that he claimed to have found in the street could have been charged as theft by finding (assuming the court was accepting his account of the facts) and case 196 concerning the theft of electronics whilst the offender was staying at a friend's house could have been suitably categorised as theft from a dwelling.<sup>11</sup>

Since this type of theft captures all offences not covered by other categories of the offence, the cases incorporate a variety of offending circumstances rather than sharing a common theme. Drawing similarities between these offences is undesirable because they are generally not comparable.

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<sup>11</sup> Additionally, cases 027, 028, 029 and 198 might have been suitable for a charge of burglary. In cases 027-029 the three co-offenders had pleaded guilty to theft having climbed a fence to and stolen scrap metal (of an unknown value) from a merchant's yard. Each offender was disqualified from driving for 12 months and placed under a four or five month curfew. In 198, the offender had removed a piece of fencing to gain entry to a warehouse's delivery area from where he stole groceries valued £2. He was ordered to pay a £75 fine

### 5.2.12 Abstraction of Electricity

Abstraction of electricity appeared in two cases within the sample (004 and 034) neither of which resulted in the imposition of a custodial sentence. Owing to the nature of the offence, both cases had similar facts: the offender had interfered with an electricity meter so as to bypass the reader. Both offences were committed by unemployed white males in their early 30s who fully admitted the offences. The offender in case 034 had 17 previous convictions, including 11 for theft, whereas the offender in 004 had a clean prior record. Both were sentenced towards the bottom end of the hierarchy, with 034 receiving a 12-month conditional discharge, and 004 being ordered to pay a £50 fine, compensation and costs. The value of the electricity abstracted in both cases was unknown and the victims had both stipulated that the loss would be invoiced to the defendants once it had been calculated.

### 5.3 Secondary Offence

In a large number of cases, the offender was sentenced for more than one offence, be it a further theft (which was counted as another case within the sample), a property offence other than theft, a non-property offence or a combination of these. Depending on its nature, a non-theft offence could be perceived by the court as either more or less serious than the theft itself. If more serious, the gravity of the non-theft may heavily influence the sentencing decision, and the theft may be rendered little more than a 'bolt-on' to the more serious offence. Table 5.3 shows the relationship between the secondary offence and the sentence type imposed. Of the 292 cases in the sample, 163 (55.8%) were sentenced for only one theft, leaving a remaining 129 cases (44.2%) in which the court sentenced the offender for more than one offence. Those who were sentenced to two or more offences were more likely to

face a custodial sentence (43.4%) compared to those who were sentenced to only one theft (17.8%), regardless of the nature of the second (or indeed third) offence. This might be evidence of the courts sentencing on totality: whilst each individual offence may not warrant imprisonment, when taken as a whole the offending behaviour may cross the custody threshold. An offender sentenced for two or more offences was less likely to be given a discharge, with only five (3.9%) such offenders receiving this sentence compared with 36 (22.1%) people sentenced for a single theft. Similarly financial penalties were more commonly imposed for single offences (19 percent compared with 4.7 percent for multiple offending). Overall, when sentencing an offender for more than one offence, the courts were more likely to impose a custodial or community-based sentence.

**Table 5.3 Sentence Type and Secondary Offences**

			Other Offence					Total
			None/ none stated	Theft	Other property	Non-property	Combination	
Sentence Type	Immediate custody	N.	25	23	4	10	16	78
		%	15.3%	34.3%	66.7%	45.5%	47.1%	26.7%
	Suspended sentence	N.	3	0	0	0	0	3
		%	1.8%	.0%	.0%	.0%	.0%	1.0%
	Detention Training Order	N.	1	2	0	1	0	4
		%	.6%	3.0%	.0%	4.5%	.0%	1.4%
	CRO	N.	20	10	0	6	3	39
		%	12.3%	14.9%	.0%	27.3%	8.8%	13.4%
	CPO	N.	2	0	0	0	2	4
		%	1.2%	.0%	.0%	.0%	5.9%	1.4%
	CPRO	N.	2	2	0	0	3	7
		%	1.2%	3.0%	.0%	.0%	8.8%	2.4%
	DTTO	N.	15	9	0	2	9	35
		%	9.2%	13.4%	.0%	9.1%	26.5%	12.0%
	Curfew	N.	5	0	0	0	0	5
		%	3.1%	.0%	.0%	.0%	.0%	1.7%
	Attendance Centre	N.	1	0	0	0	0	1
		%	.6%	.0%	.0%	.0%	.0%	.3%
	Supervision Order	N.	8	4	1	1	1	15
		%	4.9%	6.0%	16.7%	4.5%	2.9%	5.1%
	Fine	N.	28	2	1	0	0	31
		%	17.2%	3.0%	16.7%	.0%	.0%	10.6%
	Discharge	N.	36	4	0	1	0	41
		%	22.1%	6.0%	.0%	4.5%	.0%	14.0%
	Referral Order	N.	12	8	0	0	0	20
		%	7.4%	11.9%	.0%	.0%	.0%	6.8%
	Reparation Order	N.	2	0	0	0	0	2
		%	1.2%	.0%	.0%	.0%	.0%	.7%
	CRASBO	N.	0	0	0	1	0	1
		%	.0%	.0%	.0%	4.5%	.0%	.3%
	Costs	N.	1	0	0	0	0	1
		%	.6%	.0%	.0%	.0%	.0%	.3%
	Compensation	N.	2	3	0	0	0	5
		%	1.2%	4.5%	.0%	.0%	.0%	1.7%
Total		N.	163	67	6	22	34	292
		%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

Chi-square = 120.909 Df = 64 P= 0.000



## 5.4 Planning

Although planning is often regarded as a potentially aggravating factor,<sup>12</sup> for the most part, it does not appear to have impacted greatly on the type of sentence imposed in the sample of cases. This may be surprising as planning may also be linked with other aggravating factors, including sophistication, offending by groups, and thefts where high-value goods are targeted. At the same time, planning might be graded according to its extent. The planning as part of a large-scale embezzlement by an employee may be significantly more aggravating than the more limited planning which precedes many typical shopliftings.

The apparent statistical significance between planning and the sentence may be misleading. Some high-value thefts are planned, as are some much lower value cases and that probably accounts for the relatively high numbers of cases resulting in custodial sentences and fines and discharges.

Table 5.4 shows that whilst immediate imprisonment was the most commonly imposed penalty for planned offending (imposed in 22.7 percent of such cases), less punitive sanctions including fines and discharges were also frequently imposed (in 9.7 percent and 14.5 percent of cases respectively). During interviews, magistrates often identified planned offending as an example of aggravation which might take the offence beyond the custody threshold.<sup>13</sup> It may be, however, that there were other offence characteristics which mitigated what would otherwise have been a tougher sentence. However, Table 5.4 above shows that all sentencing options are used by the courts in cases involving planning. There is also no noticeable difference in the use of custody for planned or impulsive offending, although the nine impulsive offences resulting in custody often had other significant sources

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<sup>12</sup> Magistrates' Association (2004); SGC (2004a), page 6

<sup>13</sup> See Section 7.2.4

of aggravation. For example, cases 069, 190 and 221 all involved the theft of high value goods (£650 in the former and £2,000 each in the latter two). Three impulsive cases where the offender pleaded not guilty to theft of a mobile telephone also received custodial sentences (cases 203, 290 and 291).

The Table also shows that a planned offence is more likely to be met with a CRO (15%) or DTTO (15.5%) than an offence committed on impulse (2.7% each). However this probably has less to do with the planning and more to do with other factors such as motive (DTTOs were only imposed for offences committed to fund a drug habit) and previous convictions. The small number of offences committed on impulse also gives reason to question this perceived trend.

**Table 5.4 Sentence Type and Planning**

		Planning			Total
		Planned	Impulsive	Unknown	
Sentence Type	Immediate custody	N. 47	9	22	78
	%	22.7%	24.3%	45.8%	26.7%
	Suspended sentence	N. 1	1	1	3
	%	.5%	2.7%	2.1%	1.0%
	Detention Training Order	N. 2	0	2	4
	%	1.0%	.0%	4.2%	1.4%
	CRO	N. 31	1	7	39
	%	15.0%	2.7%	14.6%	13.4%
	CPO	N. 3	1	0	4
	%	1.4%	2.7%	.0%	1.4%
	CPRO	N. 4	3	0	7
	%	1.9%	8.1%	.0%	2.4%
	DTTO	N. 32	1	2	35
	%	15.5%	2.7%	4.2%	12.0%
	Curfew	N. 5	0	0	5
	%	2.4%	.0%	.0%	1.7%
	Attendance Centre	N. 0	1	0	1
	%	.0%	2.7%	.0%	.3%
	Supervision Order	N. 12	2	1	15
	%	5.8%	5.4%	2.1%	5.1%
	Fine	N. 20	3	8	31
	%	9.7%	8.1%	16.7%	10.6%
	Discharge	N. 30	7	4	41
	%	14.5%	18.9%	8.3%	14.0%
	Referral Order	N. 13	6	1	20
	%	6.3%	16.2%	2.1%	6.8%
	Reparation Order	N. 1	1	0	2
	%	.5%	2.7%	.0%	.7%
	CRASBO	N. 1	0	0	1
	%	.5%	.0%	.0%	.3%
	Costs	N. 1	0	0	1
	%	.5%	.0%	.0%	.3%
	Compensation	N. 4	1	0	5
	%	1.9%	2.7%	.0%	1.7%
Total		N. 207	37	48	292
		% 100.0%	100.0%	100.0%	100.0%

Chi-square = 56.644 Df = 62 P= 0.005

## 5.5 Recovery of Property

In those cases in the sample where the offender is apprehended at the scene, it was likely that the stolen property would have been recovered. Although this reduces the level of harm caused to the victim, the SAP has suggested that the recovery of property in cases where the offender has no control over the recovery “should not influence the assessment of offence seriousness nor provide personal mitigation”.<sup>14</sup> However, in other cases the offender may voluntarily return the stolen property, for which he should receive a sentence discount.<sup>15</sup> This credit offers an incentive for offenders to return the property, a point which the SGC appears to be in agreement with: “whether and the degree to which the return of stolen property constitutes a matter of personal mitigation will depend on an assessment of the circumstances and, in particular, the voluntariness and timeliness of the return.”<sup>16</sup>

Although the recovery of property should not ordinarily influence the sentencing decision (unless the offender voluntarily returns the property or otherwise assists in its recovery), the courts may decide to impose an ancillary compensation order where the property has not been recovered.<sup>17</sup> Section 130 of the PCCSA 2000 requires the court to consider making a compensation order in cases involving, *inter alia*, loss or damage to property, and to give reasons if no compensation order is made.

Compensation was ordered in only one of the 210 cases (71.9 percent) in which all of the stolen property was recovered. Cases 067 and 068 involved an offender sentenced for two

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<sup>14</sup> SAP (2008a), at 3. Although this statement was made under the 2003 Act sentencing framework, the logic could just as easily have applied to the 1991 Act regime.

<sup>15</sup> Ibid, page 3-4

<sup>16</sup> SGC (2008), at 4

<sup>17</sup> In their review of sentencing practice in the 1990s, Flood-Page & Mackie (1998) found that the reason most frequently stated in court for *not* awarding compensation in property offences was because the goods had been recovered; at page 60.

counts of theft from a vehicle. On two separate occasions, he stole a spare wheel from two cars, each valued £150. The offender was ordered to pay £300 in compensation to the victims notwithstanding the fact that in 067 the property had been recovered. The compensation ordered thus reflected the total value of the property stolen, despite the fact that effectively half of the property had been recovered. This might be explained in two ways. Firstly, according to s.130(5) of the Powers of the Criminal Courts (Sentencing) Act 2000 where, as a result of an offence against the Theft Act 1968, the owner is temporarily deprived of his property but is subsequently rejoined with it, “any damage to the property occurring while it was out of the owner’s possession shall be treated...as having resulted from the offence”, rendering the offender liable to pay compensation even if he was not directly to blame for the damage caused. Consequently, if damage had been caused to the stolen property prior to its recovery, the offender would be liable for a payment of compensation. Perhaps more likely, upon realising that his spare wheel had been stolen the victim may have purchased a replacement, the cost of which he was compensated for when the offender was sentenced two months after the offence occurred.

Where the stolen property was not recovered, there was a far greater incidence of compensation being awarded. Of the 52 cases where none of the property was recovered, 27 (51.9%) did not result in an order for compensation. In 20 of the remaining 25 cases, the level of compensation awarded was equal to the value of the goods stolen. However, the compensation exceeded the value of the stolen property in case 247. The offender had stolen £5 by breaking into a laundrette’s washing machines and taking the cash from the moneyboxes inside. He was ordered to pay £205 compensation, which included £5 for the non-recovery of the stolen cash and £200 for the damage caused to the machines. In three further cases (006, 208 and 209), the compensation was less than the value of the non-recovered property. In case 006, the offender had stolen electronics valued £350 and was

ordered to pay £80 in compensation. The alleged £350 value may have reflected the cost of the goods at new, whilst the court may have been of the opinion that £80 more accurately reflected the current market value. In cases 208 and 209, a 14-year-old offender had stolen from two victims electronics valued £80 and £130 respectively. She was ordered to pay £20 in compensation to each victim; significantly less than the value of the stolen items. As with case 006, the reduced compensation may have been a more accurate representation of the true value of the property at the time of the offence. Furthermore, the offender's age and lack of financial means may have led the court to believe that it was unrealistic to expect the offender to be able to pay more. One further case (004, an abstraction case) compensation of £120 was awarded but the value of the property stolen was unknown.<sup>18</sup>

As previously mentioned, the sample included 27 cases in which the property stolen was not recovered and no compensation was awarded. There appear to be two principal reasons for the courts' disinclination to impose an order for compensation. In thirteen of these cases the offender was subjected to an immediate custodial sentence. In one further case (037) the offender was handed an absolute discharge for the current offence but was at the time serving a period of five years' imprisonment for burglary. Four cases (two of which also resulted in a custodial sentence) specifically stated that compensation was not ordered as the offender had no means to make such payment. Case 034 involved abstraction of electricity of an unknown value, which was expressed as being the reason for not ordering compensation to the victim. However in case 004, on very similar facts, the victim was awarded £120 compensation despite the fact that the value of property abstracted could not be ascertained. Similarly with case 230, the offender had siphoned off fuel (of an unknown value) from a vehicle. Moreover, the owner of the vehicle was unknown, thereby preventing the payment

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<sup>18</sup> C.f. *R v Donovan* (1981) 3 Cr App R (S) 192 where the Court held that "a compensation order is designed for the simple, straightforward case where the amount of the compensation can be readily and easily ascertained." Per Eveleigh LJ, at 192. The decision was followed in the post-1991 Act case of *Briscoe* (1994) 15 Cr App R (S) 699.

of compensation. On occasions, the courts have forgone awarding compensation but have still imposed a fine and/or an order for costs. Cases 123 and 200 resulted in the imposition of fines of £50 and £100 respectively but no order for compensation was made despite the fact that the property was not recovered. Such a practice appears to be contrary to s.130(12) of the PCC(S)A 2000 which gives the imposition of compensation priority over a fine.

## 5.6 Value of Property

Table 5.5 shows the relationship between the monetary value of the stolen property and the type of sentence imposed. The value of the stolen property may be the prime determinant in assessing harm, particularly where the property is not recovered. Where an offender specifically targets high value goods, his culpability may also be enhanced.<sup>19</sup> The Sentencing Guidelines Council makes specific reference to high value as an offence-related aggravating factor.<sup>20</sup>

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<sup>19</sup> SGC (2004), page 6

<sup>20</sup> Ibid, page 7

**Table 5.5 Sentence Type and Monetary Value**

			Monetary Value						Total	
			Under 100	100-250	250-500	500-5,000	5,000-17,500	17,500-100,000		Unknown
Sentence Type	Immediate custody	N.	48	12	11	6	0	1	0	78
		%	23.1%	27.3%	47.8%	60.0%	.0%	100.0%	.0%	26.7%
	Suspended sentence	N.	1	1	0	0	1	0	0	3
		%	.5%	2.3%	.0%	.0%	50.0%	.0%	.0%	1.0%
	Detention Training Order	N.	4	0	0	0	0	0	0	4
		%	1.9%	.0%	.0%	.0%	.0%	.0%	.0%	1.4%
	CRO	N.	27	7	4	1	0	0	0	39
		%	13.0%	15.9%	17.4%	10.0%	.0%	.0%	.0%	13.4%
	CPO	N.	1	2	0	1	0	0	0	4
		%	.5%	4.5%	.0%	10.0%	.0%	.0%	.0%	1.4%
	CPRO	N.	5	0	1	0	1	0	0	7
		%	2.4%	.0%	4.3%	.0%	50.0%	.0%	.0%	2.4%
	DTTO	N.	26	7	2	0	0	0	0	35
		%	12.5%	15.9%	8.7%	.0%	.0%	.0%	.0%	12.0%
	Curfew	N.	2	0	0	0	0	0	3	5
		%	1.0%	.0%	.0%	.0%	.0%	.0%	75.0%	1.7%
	Attendance Centre	N.	1	0	0	0	0	0	0	1
		%	.5%	.0%	.0%	.0%	.0%	.0%	.0%	.3%
	Supervision Order	N.	12	0	3	0	0	0	0	15
		%	5.8%	.0%	13.0%	.0%	.0%	.0%	.0%	5.1%
	Fine	N.	27	2	1	0	0	0	1	31
		%	13.0%	4.5%	4.3%	.0%	.0%	.0%	25.0%	10.6%
	Discharge	N.	34	6	1	0	0	0	0	41
		%	16.3%	13.6%	4.3%	.0%	.0%	.0%	.0%	14.0%
	Referral Order	N.	14	4	0	2	0	0	0	20
		%	6.7%	9.1%	.0%	20.0%	.0%	.0%	.0%	6.8%
	Reparation Order	N.	2	0	0	0	0	0	0	2
		%	1.0%	.0%	.0%	.0%	.0%	.0%	.0%	.7%
	CRASBO	N.	1	0	0	0	0	0	0	1
		%	.5%	.0%	.0%	.0%	.0%	.0%	.0%	.3%
	Costs	N.	1	0	0	0	0	0	0	1
		%	.5%	.0%	.0%	.0%	.0%	.0%	.0%	.3%
	Compensation	N.	2	3	0	0	0	0	0	5
		%	1.0%	6.8%	.0%	.0%	.0%	.0%	.0%	1.7%
Total		N.	208	44	23	10	2	1	4	292
		%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

Chi-square = 256.925 Df = 96 P= 0.000



There were four cases in which the monetary value of the property stolen was unknown.<sup>21</sup> Eight cases involved an offender stealing a bank card, which were described on the charge sheet as having either a 'nominal value' or an 'unknown value'. For the purposes of consistency, the analysis here considers such cases to have involved stealing goods of a nominal value, thereby falling into the category of 'monetary value of under £100', although special attention must be placed on these cases owing to the *potential* value that bank cards have in gaining access to (significant) funds. In six of the eight cases involving thefts of bank cards, the offender had used the debit or credit card to obtain funds from the cardholder's account,<sup>22</sup> or used the card as payment of goods purchased.<sup>23</sup> In such cases the extent of the card's spend would be used to measure the monetary value of the goods stolen. That is, if the card was used to purchase goods to the value of £500, this figure would be taken as the monetary value of the property stolen.

Cases involving the theft of bank cards were most commonly dealt with by way of community sentences or immediate imprisonment (each imposed in three cases). In each case, the decision to imprison may have been influenced by the presence of other aggravating factors, rather than being rooted on the type (and value) of the property. The offender in case 171 was employed as a waitress and removed two bank cards from a customer's handbag. The cards were not used before being returned. However, the magistrates imposed a two-month custodial sentence, a decision which may have been influenced by the offender's prior record which included 23 previous convictions (including

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<sup>21</sup> Case 004 in the sample concerned abstraction of electricity to a value unknown. Although the electricity board planned to invoice the offender £300 to cover the costs of making the power supply safe again, this charge has no bearing on the value of electricity abstracted. Furthermore, this £300 charge was not sought through criminal proceedings but would be added to the offender's electricity statement. Therefore this administrative charge would be expected to have no effect on the sentence imposed and did not reflect the value of the property stolen. Cases 027, 028 and 029 all arose out of a single incident concerning three co-offenders who together stole scrap metal of an unknown value from a vehicle parts manufacturer.

<sup>22</sup> Relating to cases 013, 179 and 283, the offender withdrew £300 from the victim's bank account, whereas in case 170 the offender had made three withdrawals totalling £750.

<sup>23</sup> In 245, the offender had used the card to purchase goods valued £250. In 282, goods valued £80 were fraudulently obtained.

nine thefts) for which she had received a number of fines and community-based penalties. The ineffectiveness of these previous sentences may have led the magistrates to regard custody as the only reasonable option. A custodial sentence was also imposed on the offender in cases 282 and 283, who had stolen two credit cards belonging to elderly victims over whom the offender acted as a carer. One card was used to withdraw £300 from the victim's account whilst the other was used to fraudulently purchase goods valued £80. The offender pleaded guilty to three counts of theft and one of obtaining property by deception, for which she received four concurrent 18-month custodial sentences.

Of the remaining two cases, one (170) involved a young offender with no previous convictions who received a mandatory referral order, whilst the other (139, in which the offender had admitted to finding a bank card on a railway platform but was apprehended before having an opportunity to use the card) resulted in a £250 fine.

In the majority of cases (71.2%) the monetary value of the property stolen was under £100. As the value of the goods increased, the number of incidents falling into the value categories decreased. This is explained in part by the large number of thefts committed against retailers, where the value of property displayed on a shelf often will not exceed £100. Where stores do stock property of a greater value, such goods might be more difficult to steal with retailers employing additional anti-theft measures, thereby deterring potential offenders away from these goods. The sample also only included three cases of theft of a vehicle, often a high-priced commodity.<sup>24</sup> This might also offer some explanation as to why the vast majority of cases involved relatively low value goods.

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<sup>24</sup> For details of these cases, see Section 5.2.3 above.

All six cases of theft by an employee involved property valued at greater than £100, although only once did the value exceed £5,000. Cases 060 and 061 were simple instances of an employee taking money from the cash register. Over the course of two days she was known to have taken a little over £300. The offender had seven previous convictions, three of which were for theft, and following a guilty plea was sentenced to three months' imprisonment for each offence to run consecutively. Case 210 involved a theft from a shop by an employee (the offence was charged as theft by an employee rather than theft from a shop). Here the offender attempted to leave his works premises prior to the end of his shift whilst carrying a DVD player to the value £250. The offender had four previous convictions, only one of which was for theft, and his last court appearance was two years earlier. Following his guilty plea, the offender was fined. Cases 114 and 115 involved an offender who pleaded guilty to two counts of theft totalling approximately £1,800 from an employer and one count of false accounting. The offender had no previous convictions; the magistrates imposed a 150-hour community punishment order and a compensation order to cover the extent of the victim's loss. Similarly in case 292, the manager of a hardware store misappropriated £27,600 by issuing fictional refunds either onto his debit card or authorising cash refunds for goods he had never actually purchased. He then altered the stock levels on the store's systems to conceal his actions. Despite pleading guilty and having no previous convictions, the Crown Court sentenced him to 12 months' imprisonment, no doubt in light of the seriousness of the offence involving as it did high value goods and a breach of a position of trust.<sup>25</sup>

Generally it appears that as the value of the goods stolen increases so too does the chance of a custodial sentence being imposed, although the small numbers of cases falling within the

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<sup>25</sup> This offender was also sentenced to 12 months' imprisonment for false accounting to run concurrently to the term for theft. A charge of obtaining a money transfer by deception, the only charge for which the offender pleaded not guilty, was ordered to lie on file.

higher value categories may impact on this apparent correlation.<sup>26</sup> In cases where the value of the property stolen was less than £100, 48 (23.2%) offenders were ordered to serve a term of immediate imprisonment. This rises to 27.3% where the value is between £100-£250, 47.8% if the goods stolen are worth between £250 and £500, and 60% for goods between £500 and £5,000. No cases where the value was between £5,000 and £17,500 led to a term of immediate imprisonment, although one offender (50%) was given a suspended sentence. The sole offender who stole property of a value greater than £17,500 (case 292) received an immediate custodial term of 12 months' imprisonment.

When looking at all custodial sentences (including terms of immediate imprisonment, suspended sentences and detention and training orders), the same trend seems to arise: the proportion of custodial sentences increases in line with the value of goods. 53 (25.6%) of those who stole goods valued at less than £100 were given a custodial sentence. Where the property stolen was worth £100-£250, thirteen offenders (29.6%) received a custodial penalty. No suspended sentences or detention and training orders were imposed on offenders who stole property worth more than £250.

## 5.7 Sophisticated Offending

Guidelines in the past have cited sophistication as an aggravating factor, although a definition of the term is not provided.<sup>27</sup> Sophistication is taken here to include offenders who have taken steps to avoid detection, or who are skilled in a particular area to enable the

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<sup>26</sup> Similarly, in their study of sentencing practice in retail thefts, Speed and Burrows (2006) found that custody and community sentences were more likely to be imposed where the value of the goods stolen was greater than £100; at page 36. In addition, Flood-Page & Mackie (1998) found that, in thefts resulting in custody, the average amount stolen was £407 compared with £294 for other sentences; at page 25.

<sup>27</sup> Magistrates' Association (2004)

offending. Abstraction of electricity will often be deemed to have been sophisticated, particularly where the offender is an experienced electrician. Table 5.6 shows the relationship between sentence and sophistication. Five cases within the sample involved sophistication. In three of these, the offender had taken steps to avoid detection (cases 114, 115 and 292). In cases 114 and 115, the offender pleaded guilty to two counts of theft by an employee and a single count of false accounting, having transferred almost £1,800 from a company bank account into his private bank account. He then closed the company account in an attempt to avoid detection. The offender was ordered to undertake a 150-hour CPO and pay compensation for the unrecovered funds. In case 292, the offender pleaded guilty to one count of theft by an employee and false accounting. The offender was employed as a store manager and, over a 16-month period, he had authorised a number of refunds in his own name totalling £27,600. He then altered the stock levels of the store's computer systems in an effort to avoid detection. The Crown Court imposed a 12 month term of imprisonment, concurrent for each offence. In all three cases, the offenders had no previous convictions to influence the sentencing decision, but the seriousness of the offence may have justified the imposition of a community-based sentence or custody respectively, either in reference to the value of the property stolen or the breach of trust. The sophistication of the offence may have contributed to the sentencing decision but would not have been a significantly influential factor.

The other cases involving sophistication (004 and 034) involved offenders abstracting electricity by bypassing an electrical meter. In both cases the value of the electricity was unknown, but both offences had occurred over a prolonged period of time. The offender in case 004 was ordered to pay a £50 fine, whereas a 12-month conditional discharge was imposed in case 034. Neither offence was deemed sufficiently serious to cross the community-sentence threshold (or indeed the custody threshold). Any impact that the

sophisticated nature of the offences had on the sentencing decision would appear to have been nominal.

**Table 5.6 Sentence Type and Sophistication**

			Sophistication		Total
			Yes	No	
Sentence Type	Immediate custody	N.	1	77	78
		%	20.0%	26.8%	26.7%
	Suspended sentence	N.	0	3	3
		%	.0%	1.0%	1.0%
	Detention Training Order	N.	0	4	4
		%	.0%	1.4%	1.4%
	CRO	N.	0	39	39
		%	.0%	13.6%	13.4%
	CPO	N.	2	2	4
		%	40.0%	.7%	1.4%
	CPRO	N.	0	7	7
		%	.0%	2.4%	2.4%
	DTTO	N.	0	35	35
		%	.0%	12.2%	12.0%
	Curfew	N.	0	5	5
		%	.0%	1.7%	1.7%
	Attendance Centre	N.	0	1	1
		%	.0%	.3%	.3%
	Supervision Order	N.	0	15	15
		%	.0%	5.2%	5.1%
	Fine	N.	1	30	31
		%	20.0%	10.5%	10.6%
	Discharge	N.	1	40	41
		%	20.0%	13.9%	14.0%
	Referral Order	N.	0	20	20
		%	.0%	7.0%	6.8%
	Reparation Order	N.	0	2	2
		%	.0%	.7%	.7%
	CRASBO	N.	0	1	1
		%	.0%	.3%	.3%
	Costs	N.	0	1	1
		%	.0%	.3%	.3%
	Compensation	N.	0	5	5
		%	.0%	1.7%	1.7%
Total		N.	5	287	292
		%	100.0%	100.0%	100.0%

Chi-square = 58.458 Df = 16 P= 0.000

## 5.8 Offences Committed in the Presence of Children

The fact that a child is present when a theft is committed is a further potential aggravating factor.<sup>28</sup> The extent of the aggravation will depend upon the nature of the role played by the child. Where a child is used as an agent in committing the offence, this may affect both culpability and harm through the suggestion that the offence was planned (thereby affecting culpability) and by encouraging the child to view stealing as acceptable (affecting harm).<sup>29</sup> The SAP had concluded that “the mere presence of a child does not make the offence more serious. Only if the child is involved in, or likely to be aware of, the theft or could be influenced or distressed by it should the offence be seen as more serious.”<sup>30</sup> None of the cases within the sample involved actively utilising a child in the commission of an offence. In two cases (155 and 249), a child was present during the offence but neither offender sought to blame the child in an attempt to avoid detection; both offenders had admitted the offences upon being detained.

In case 155, the offender had stolen from a shop baby clothes and provisions worth £82. The offender had seven previous convictions, including three for theft. Her last court appearance was nine months earlier when she was sentenced to a 12-month conditional discharge for two counts of shoplifting. For the current offence, she was ordered to undertake a 12-month CRO.

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<sup>28</sup> SGC (2004a), at 7

<sup>29</sup> SAP (2008b), at 5

<sup>30</sup> Ibid, at 6. Also see Speed and Burrows (2006) which found that a discharge or fine (imposed in 67 per cent of cases) were the most likely disposal options where an offender was accompanied by a child; at page 38.

**Table 5.7 Sentence Type and Presence of Children**

			Children Present		Total
			Yes	No	
Sentence Type	Immediate custody	N.	0	78	78
		%	.0%	26.9%	26.7%
	Suspended sentence	N.	0	3	3
		%	.0%	1.0%	1.0%
	Detention Training Order	N.	0	4	4
		%	.0%	1.4%	1.4%
	CRO	N.	1	38	39
		%	50.0%	13.1%	13.4%
	CPO	N.	0	4	4
		%	.0%	1.4%	1.4%
	CPRO	N.	0	7	7
		%	.0%	2.4%	2.4%
	DTTO	N.	0	35	35
		%	.0%	12.1%	12.0%
	Curfew	N.	0	5	5
		%	.0%	1.7%	1.7%
	Attendance Centre	N.	0	1	1
		%	.0%	.3%	.3%
	Supervision Order	N.	0	15	15
		%	.0%	5.2%	5.1%
	Fine	N.	0	31	31
		%	.0%	10.7%	10.6%
	Discharge	N.	1	40	41
		%	50.0%	13.8%	14.0%
	Referral Order	N.	0	20	20
		%	.0%	6.9%	6.8%
	Reparation Order	N.	0	2	2
		%	.0%	.7%	.7%
	CRASBO	N.	0	1	1
		%	.0%	.3%	.3%
	Costs	N.	0	1	1
		%	.0%	.3%	.3%
	Compensation	N.	0	5	5
		%	.0%	1.7%	1.7%
Total		N.	2	290	292
		%	100.0%	100.0%	100.0%

Chi-square = 5.341 Df = 16 P= 0.994



Case 249 involved a more serious form of shoplifting. With their eight and ten-year-old children present, two female offenders had stolen groceries valued £230 from a supermarket. Upon being detained, both fully admitted the offence and agreed that they had worked in partnership with each other. The co-offender had a clean prior record and was cautioned for the offence. Although the other offender had no previous convictions, she had received a caution for a similar offence four months' earlier and was given a conditional discharge of unknown duration.

In neither case was it clear how aware of the offending the children were, but the presence of the children does not appear to have had a marked impact on the sentencing decision, particularly in case 249 where the offence resulted in a discharge, and a caution for the co-offender. The decision to impose a CRO on the offender in case 155 may have been influenced by her previous convictions and the fact that an earlier imposed discharge had not expired at the time of the offence.

## 5.9 Offending By an Organised Group

Offending by a group of two or more individuals who have orchestrated an offence is assumed by guidelines to aggravate the seriousness of the offence.<sup>31</sup> The SGC states that offending by an organised group indicates a higher than usual degree of culpability.<sup>32</sup> Indeed, where retail theft is committed by an organised group and is combined with threats of violence, the offence is placed within the most serious band within the SGC's guideline, attracting a prescribed sentence of between 36 weeks and four years' imprisonment.<sup>33</sup>

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<sup>31</sup> Magistrates' Association (2004), at 60

<sup>32</sup> SGC (2004), at 6

<sup>33</sup> SGC (2008), at 17

Furthermore, in cases where the offenders confront their victim face-to-face, the level of harm may also be increased through the incitement of greater fear.<sup>34</sup>

42 cases in the sample involved offending by groups of two or more individuals. These offences were most likely to attract community-based sentences (in 40.5 percent of cases), although custody (14.3 percent), fines (14.3 percent) and discharges (9.5 percent) were also imposed. Nine offences (21.4 percent) committed by first-time young offenders resulted in the imposition of a referral order.

Although the guidelines have traditionally identified group offending as an aggravating factor,<sup>35</sup> the courts imposed a custodial sentence in only six cases. In two cases (i.e. one offence committed by two offenders) imprisonment was imposed for both parties. Cases 235 and 236 involved two offenders who had jointly broken into a toolbox fixed to the rear of a vehicle and stolen tools valued £400 from within. Both offenders had lengthy criminal records (84 previous convictions including seven thefts, and 136 prior convictions including eleven thefts respectively), and both were sentenced to four months' imprisonment following guilty pleas. The decision to imprison may have been influenced by the offenders' previous criminal history or the perceived seriousness of the offence, owing to the fact that the offenders had used force to prise open the toolbox, causing damage in the process, and steal relatively high value goods. In one further case in which custody was imposed on an offender who acted as part of a group, the co-offenders were unknown and no criminal proceedings were brought against them. In the remaining three cases, custody was only imposed against one of the co-offenders notwithstanding the fact that the other co-offenders appeared to have played an equal role in the offence. This indicates that the offence in itself

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<sup>34</sup> Ashworth (2010), at 164

<sup>35</sup> Magistrates' Association (2004), at 60; SGC (2004a), page 6

was not sufficiently serious to warrant imprisonment; custody was imposed on the basis of offender characteristics rather than offence gravity.

The fact that an offence was committed by a group appeared to have little noticeable impact on the type of sentence imposed. Where the offender had a clean prior record, or had only a few previous convictions, the courts were likely to impose a conditional discharge or fine. These offences tended to be low-value shopliftings which did not include much apparent aggravation. The offences were insufficiently serious to justify the imposition of a community penalty. In those cases leading to a community penalty, the sentencing decision may have been based on factors other than offending by a group. The court may have been influenced either by the offender's history of previous offending (case 252 in which the offender with 20 previous theft convictions had stolen cosmetics valued £23 and was placed on a 12-month CRO), the value of the property stolen (cases 225, 265, 276 concerning property valued £420, £210, and £15,000 respectively), or other factors relating to the seriousness of the offence (case 230 in which the offender and his unidentified co-offender siphoned fuel from a car, causing damage to the vehicle. The offender had also refused to name his co-offender, which may have denied him a source of mitigation at the time of sentencing. The court imposed a 12-month CPRO).

**Table 5.8 Sentence Type and Organised Groups**

			Organised Group		Total
			Yes	No	
Sentence Type	Immediate custody	N.	4	74	78
		%	9.5%	29.6%	26.7%
	Suspended sentence	N.	0	3	3
		%	.0%	1.2%	1.0%
	Detention Training Order	N.	2	2	4
		%	4.8%	.8%	1.4%
	CRO	N.	3	36	39
		%	7.1%	14.4%	13.4%
	CPO	N.	0	4	4
		%	.0%	1.6%	1.4%
	CPRO	N.	3	4	7
		%	7.1%	1.6%	2.4%
	DTTO	N.	2	33	35
		%	4.8%	13.2%	12.0%
	Curfew	N.	4	1	5
		%	9.5%	.4%	1.7%
	Attendance Centre	N.	0	1	1
		%	.0%	.4%	.3%
	Supervision Order	N.	5	10	15
		%	11.9%	4.0%	5.1%
	Fine	N.	6	25	31
		%	14.3%	10.0%	10.6%
	Discharge	N.	4	37	41
		%	9.5%	14.8%	14.0%
	Referral Order	N.	9	11	20
		%	21.4%	4.4%	6.8%
	Reparation Order	N.	0	2	2
		%	.0%	.8%	.7%
	CRASBO	N.	0	1	1
		%	.0%	.4%	.3%
	Costs	N.	0	1	1
		%	.0%	.4%	.3%
	Compensation	N.	0	5	5
		%	.0%	2.0%	1.7%
Total		N.	42	250	292
		%	100.0%	100.0%	100.0%

Chi-square = 58.978 Df = 16 P= 0.000

## 5.10 Related Damage

In most theft cases, the harm caused to the victim may be measured principally by reference to the value of the property stolen, and whether that property is later recovered. In some cases however, the offender may cause damage to other property during the course of the theft. Under a proportionality-based sentencing system, this related damage ought to be construed as impacting upon the level of harm suffered and should consequently increase the seriousness of the offence. 28 cases within the sample involved related damage being caused. Some cases included substantial damage being caused, for example damaging a vehicle (perhaps by breaking a window) with a view to stealing property from within. In other cases, the extent of the damage was less significant, such as where the offender removes packaging or labels from goods. Of the 28 cases involving related damage, ten (35.7 percent) resulted in a custodial sentence being imposed (compared with 28.4 percent of cases with no related damage), including two detention and training orders. 11 (39.3 percent) led to a community-based sentence and four (14.2 percent) resulted in either a fine or a discharge. The remaining three offences were committed by young offenders who received either a referral order or reparation order.

**Table 5.9 Sentence Type and Related Damage**

			Related Damage		Total
			Yes	No	
Sentence Type	Immediate custody	N.	8	70	78
		%	28.6%	26.5%	26.7%
	Suspended sentence	N.	0	3	3
		%	.0%	1.1%	1.0%
	Detention Training Order	N.	2	2	4
		%	7.1%	.8%	1.4%
	CRO	N.	6	33	39
		%	21.4%	12.5%	13.4%
	CPO	N.	0	4	4
		%	.0%	1.5%	1.4%
	CPRO	N.	0	7	7
		%	.0%	2.7%	2.4%
	DTTO	N.	2	33	35
		%	7.1%	12.5%	12.0%
	Curfew	N.	0	5	5
		%	.0%	1.9%	1.7%
	Attendance Centre	N.	0	1	1
		%	.0%	.4%	.3%
	Supervision Order	N.	3	12	15
		%	10.7%	4.5%	5.1%
	Fine	N.	2	29	31
		%	7.1%	11.0%	10.6%
	Discharge	N.	2	39	41
		%	7.1%	14.8%	14.0%
	Referral Order	N.	2	18	20
		%	7.1%	6.8%	6.8%
	Reparation Order	N.	1	1	2
		%	3.6%	.4%	.7%
	CRASBO	N.	0	1	1
		%	.0%	.4%	.3%
	Costs	N.	0	1	1
		%	.0%	.4%	.3%
	Compensation	N.	0	5	5
		%	.0%	1.9%	1.7%
Total		N.	28	264	292
		%	100.0%	100.0%	100.0%

Chi-square = 19.604 Df = 16 P= 0.239

The most common type of damage to be caused involved the offender removing security tags, labels or other packaging during the course of a shoplifting. This occurred in 12 of the 28 cases and such damage may not have been significant enough to have factored greatly in the court's sentencing decision. Three of these 12 cases resulted in a custodial sentence being imposed (cases 212, 272 and 287), but the decision to imprison the offender in each case was almost certainly due to the offender's previous convictions (case 212) or multiple offending (272 and 287). For example, the offender in case 272 had pleaded guilty to the theft of spirits valued £50 from a supermarket. Having removed the security tags, he attempted to leave but was detained by security staff. The offender was placed on bail following this offence, but shortly after committed a further shoplifting (case 271). The magistrates' court imposed sentences of 28 days' imprisonment for each offence and ordered them to run concurrently. The damage caused to the security tags is unlikely to have impacted on the court's sentencing decision.

When sentencing a young offender, the court is under a statutory duty to impose a referral order, providing the offender has entered a guilty plea, does not have any previous convictions and either, the sentence for the offence is not fixed by law, or the court is not proposing to impose a custodial sentence, or the court is not proposing to impose an absolute discharge.<sup>36</sup> In the two cases involving first-time young offenders committing thefts causing related damage (cases 108 and 195), the court imposed referral orders for eight months and six months respectively. The offences were insufficiently serious to justify a custodial sentence, but were too serious to warrant an absolute discharge. Five other cases involving damage were committed by young offenders with one or more previous convictions. None of these were dealt with by way of referral order. Custodial sentences were imposed in cases 212 and 251, although the damage caused may have had no impact

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<sup>36</sup> Sections 16 & 17 PCCSA 2000

on the decision to imprison. In 251, the 14-year-old offender had forced open a cashbox in a laundrette and stolen £2.50 contained within. The court imposed a four month detention and training order, to run concurrently to an order recently imposed for an unrelated robbery. His 15-year-old co-offender (case 250) had one previous conviction and was ordered to undertake supervision for six months. The offenders were treated as joint principal parties; the difference in sentence was due only to their previous criminality. A detention and training order was also imposed in case 212 in which the 15-year-old offender had stolen clothing accessories valued £50 from a shop. Having removed the security tags, he was detained and immediately admitted the offence. The offender had ten previous convictions and had appeared in court on five occasions within the last year. Supervision orders had previously been imposed but had failed to control the offender's criminal behaviour; this may have been the primary influence in the decision to impose a custodial sentence.

In five cases, substantial damage was caused by an offender forcing entry into a vehicle to steal property from within. A period of immediate imprisonment was imposed in three of these cases, and was therefore the most likely outcome. An absolute discharge was imposed in case 037 in which the offender had broken into a vehicle and stolen a stereo system valued £170, causing significant damage to the vehicle in the process. At the time of sentencing, the offender was serving a five-year term of imprisonment for burglary which may have heavily influenced the court's sentencing decision. In the fifth case, 213, the offender was ordered to pay a £75 fine and £20 compensation, having broken a car window to steal a handbag from inside the vehicle. Even though significant damage was caused, it appears that the court did not view this as sufficient aggravation to cross the community-sentence threshold.



In four cases involving related damage, the offender was ordered to pay compensation alongside the imposition of another sentence. In only one of these cases (247) was the compensation known to have been based on the damage caused. In two others (004 and 213) it was unclear whether the order for compensation was to cover the costs of the damage or the non-recovery of the stolen property. In all other cases involving related damage, no compensation was ordered to redress the costs incurred in repairing the damage caused.

### 5.11 Motive

The motivation behind the offender's behaviour may be relevant to the assessment of his culpability. An offender who steals out of greed may be regarded as more blameworthy than an offender who steals out of need or desperation. That being said, there was no evidence in the CPS files to suggest that any of the sample's cases involved an offender with a 'good' or excusable motive. Where the offender's motive points to the existence of a criminogenic need which constitutes the root cause of the offending behaviour, the court may be inclined to impose a rehabilitative sentence aimed at treating the cause, thereby reducing the offender's propensity to reoffend. Perhaps the most obvious example of this paradigm is the use of DTTOs for offences committed to fund a drug addiction.

That said, there was at least one instance where the court still imposed a DTTO in a case which was quite (though not especially) serious. The offender in case 146 pleaded guilty to having stolen clothing valued £280 from a shop. He had 66 previous convictions, including 17 for theft and was made subject to a 12-month DTTO. This may be contrasted with case 140 in which the drug-dependent offender had stolen clothing valued £700 from a shop. The court imposed a four-month term of imprisonment. Arguably, the high value of the property

was enough in itself to justify a custodial sentence. The clear implication is that the offence in 140 was that bit more serious than in 146, so that a custodial sentence was (justifiably) imposed.

There were 34 cases in which drug addicts were dealt with by means other than a DTTO. At the time of passing sentence in these cases, the court would have been required to have regard to section 52 of the PCCSA 2000, which gave the court a power to impose a DTTO on an offender who had a drug addiction that was susceptible to treatment. Accordingly, the court could only impose a DTTO if it was satisfied that the offender was dependent on or had a propensity to misuse drugs,<sup>37</sup> that the dependency required and could be susceptible to treatment,<sup>38</sup> and that the offender had expressed a willingness to comply with the order.<sup>39</sup> In one case (021), it was clear that the offender did not wish to comply with a drug-related order, having refused assistance from a member of the drug referral team at the police station following his arrest. In other cases, offenders may have been similarly unwilling, but this information was missing from the CPS file. The offender's willingness may not be made apparent until after a PSR has been drafted. Consequently, the court would be aware of the offender's unwillingness to comply leading it to impose an alternative sentence, but the reason for this decision would not be easily ascertainable from the CPS file. There are, therefore, a number of cases in which it is not clear why the offender's drug dependency was not addressed by the court at sentencing.

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<sup>37</sup> Section 52(3)(a)

<sup>38</sup> Section 52(3)(b)

<sup>39</sup> Section 52(7)

**Table 5.10 Sentence Type and Motive**

			Motive						Total
			None apparent	Financial gain	To purchase other goods	Desired the stolen goods	Fund drug/alcohol dependency	Other	
Sentence Type	Immediate custody	N.	45	11	2	5	13	2	78
		%	31.5%	29.7%	25.0%	14.7%	22.4%	16.7%	26.7%
	Suspended sentence	N.	2	0	0	1	0	0	3
		%	1.4%	.0%	.0%	2.9%	.0%	.0%	1.0%
	Detention Training Order	N.	4	0	0	0	0	0	4
		%	2.8%	.0%	.0%	.0%	.0%	.0%	1.4%
	CRO	N.	18	4	3	6	5	3	39
		%	12.6%	10.8%	37.5%	17.6%	8.6%	25.0%	13.4%
	CPO	N.	2	2	0	0	0	0	4
		%	1.4%	5.4%	.0%	.0%	.0%	.0%	1.4%
	CPRO	N.	2	3	0	1	1	0	7
		%	1.4%	8.1%	.0%	2.9%	1.7%	.0%	2.4%
	DTTO	N.	9	2	0	0	24	0	35
		%	6.3%	5.4%	.0%	.0%	41.4%	.0%	12.0%
	Curfew	N.	4	0	0	0	1	0	5
		%	2.8%	.0%	.0%	.0%	1.7%	.0%	1.7%
	Attendance Centre	N.	0	1	0	0	0	0	1
		%	.0%	2.7%	.0%	.0%	.0%	.0%	.3%
	Supervision Order	N.	11	2	1	1	0	0	15
		%	7.7%	5.4%	12.5%	2.9%	.0%	.0%	5.1%
	Fine	N.	13	4	0	8	4	2	31
		%	9.1%	10.8%	.0%	23.5%	6.9%	16.7%	10.6%
	Discharge	N.	18	2	2	8	9	2	41
		%	12.6%	5.4%	25.0%	23.5%	15.5%	16.7%	14.0%
	Referral Order	N.	12	3	0	2	0	3	20
		%	8.4%	8.1%	.0%	5.9%	.0%	25.0%	6.8%
	Reparation Order	N.	1	0	0	1	0	0	2
		%	.7%	.0%	.0%	2.9%	.0%	.0%	.7%
	CRASBO	N.	0	0	0	0	1	0	1
		%	.0%	.0%	.0%	.0%	1.7%	.0%	.3%
	Costs	N.	1	0	0	0	0	0	1
		%	.7%	.0%	.0%	.0%	.0%	.0%	.3%
	Compensation	N.	1	3	0	1	0	0	5
		%	.7%	8.1%	.0%	2.9%	.0%	.0%	1.7%
Total		N.	143	37	8	34	58	12	292
		%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

Chi-square = 142.385 Df = 80 P= 0.000

In other cases, the court may have been discouraged from imposing a DTTO due to the seriousness of the offence warranting a custodial sentence or more punitive community sentence (cases 140, 179, 220 and 221 all involved relatively high-value goods or a breach of trust and resulted in the court imposing immediate imprisonment or a CPRO). Alternatively, the offender may have been the subject of a pre-existing DTTO, which the court ordered to continue to run (cases 121, 151 and 157) whilst imposing a discharge for the current offence. Thirdly, the court would not seem to impose a DTTO in cases where the offender was currently serving a custodial sentence for an unrelated offence (case 037) or had committed the present offence whilst on licence from prison release (cases 038 and 237). Finally, in case 134, the decision not to impose a DTTO may have been made on the basis that the offence was insufficiently serious to justify a community-based sentence. The offender had pleaded guilty to stealing groceries valued £2.50 from a supermarket leading the court to impose a £25 fine.

Only two cases involving a female offender resulted in the imposition of a DTTO, reflecting the small number of females who were known to commit their crimes to fund a drug or alcohol dependency, a motive present in only six female cases (059, 127, 136, 156, 232, and 237). Of the two cases where the court imposed a DTTO on a female offender, only one case (case 156) was known to have involved an offender stealing to fund her addiction. In case 112, on the other hand, the offender was made subject of a DTTO but no apparent motive for the offending was given in the CPS file; a drug-related motive may however have been brought to the courts attention in a pre-sentence report. Since case 156 was the only instance in which the court imposed a DTTO upon a female who stole to fund a drug addiction, the other five female cases involving a drugs-related motive were either dealt with by way of custody, a CRO or discharge. All six offenders had pleaded guilty to shoplifting of property with a value below £100, and all had a history of prior offending.

The offender in case 237 had very recently been released from prison, which may have influenced the court in its decision to impose upon her a further custodial sentence. The offender in case 232 had voluntarily sought help for her drug dependency, which may have led the court to feel that formal court intervention with the addiction would be unnecessary. Instead, the court imposed a two-year CRO, which may have been aimed at supporting the offender with her voluntary drug treatment. The final two cases (127 and 136) where a female offender was known to offend due to a drug addiction were both dealt with by way of a conditional discharge. Neither of the offenders had previously been subject to a DTTO, although both had a significant number of previous convictions: the offender in case 127 had 33 previous convictions, including 11 for theft; the offender in case 136 also had 33 previous convictions, with 14 thefts. Both had a recent break in offending of eight months and one year respectively, which may have acted as a source of mitigation. Nonetheless, the reasons why a DTTO was not (or could not be) imposed are unknown, so too are the reasons why the court favoured a discharge.

In 143 cases (49 percent of the sample), the CPS file did not point to any particular motive behind the offending. Such cases were categorised as having “no apparent” motive, although that is not to say that the offender lacked any motive behind the offending. Nine of these cases were dealt with by a DTTO, which should only be imposed by the court in cases where the offender is known to have a drug addiction which is susceptible to treatment.<sup>40</sup> In some cases where no motive was made apparent in the case file, the true motive may not become known until the completion of a pre-sentence report.

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<sup>40</sup> Section 52(3) PCCSA 2000

## 5.12 Offending Whilst on Bail

Fifteen cases within the sample involved offences being committed either whilst the offender was on bail, or whilst released on prison licence. Fourteen of these (93.3 percent) resulted in either a community or custodial sentence, with immediate imprisonment – including detention and training orders – being imposed in ten cases (66.7 percent). The only case not dealt with by way of a community or custodial sentence was 037 in which the offender had broken into a vehicle and stolen a stereo system valued £170, causing significant damage to the vehicle in the process. At the time of sentencing, the offender was serving a five-year term of imprisonment for burglary. The magistrates imposed an absolute discharge for the theft, effectively meaning there would be no punishment imposed for that offence. The court could have ordered a prison sentence to run concurrently to the sentence for burglary, which in real terms would have the same effect of not imposing any additional punishment. The court may have been of the opinion that the current offence was not sufficiently serious to warrant the imposition of a custodial sentence. The offence may have been serious enough to justify a community sentence, but that would not be available due to the offender's incarceration for burglary. Alternatively, the court may have imposed an absolute discharge for expediency reasons. Doing so would not require the court to adjourn whilst a pre-sentence report was drafted. Martin Wasik's review discussed three reasons for the grant of an absolute discharge: where the offence was trivial, where the offender had minimal culpability, and where the offender had suffered collateral losses which could be regarded as "unofficial or indirect punishment".<sup>41</sup> Perhaps more fundamentally, Wasik was of the opinion that an absolute discharge should not be granted in response to "an offence of any seriousness."<sup>42</sup> The fact that the offence resulted in significant damage and involved the

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<sup>41</sup> M. Wasik, (1985), at 229

<sup>42</sup> *Ibid*, at 237

theft of property of more than a nominal value calls into question the court's decision to impose the least severe order available.

Although the high incidence of community and custodial sentencing in cases involving offending on bail suggests that the court is of the opinion that the seriousness of the offence is such as to warrant such a penalty, these cases often involved other aggravating factors which may have influenced the court's decision. The high value goods stolen in case 069 (£650) may have contributed to the court's decision to impose a two month custodial sentence following the offender's guilty plea for theft of jewellery by finding.

On two occasions (cases 109 and 110, and 217 and 219), an offender was sentenced for multiple thefts committed on bail. The 17 year old offender in cases 109 and 110 was sentenced for two counts of retail theft, having stolen spirits valued £17 and cosmetics valued £35 respectively. In the former case, the offender had worked as part of an organised group with two unknown co-offenders, whom he refused to name. The offender had 62 previous convictions, including 12 for theft, and was ordered to serve a four month detention and training order for each offence, to run concurrently. The decision to imprison the offender may have been based on a number of factors including multiple offending, working as an organised group, failing to cooperate with the police, entering a not guilty plea in case 109, and offending on bail. The offender in cases 217 and 219 was also sentenced for two typical thefts from a shop. The offender confessed to having a £50-per-day drug addiction which he could only fund through crime. The court imposed a 12 month DTTO in each; a sentence which would have been chiefly determined in reference to the offender's heroin addiction rather than the fact the offences were committed whilst on bail.

**Table 5.11 Sentence Type and Offending Whilst on Bail**

			Committed On Bail		Total
			Yes	No	
Sentence Type	Immediate custody	N.	8	70	78
		%	53.3%	25.3%	26.7%
	Suspended sentence	N.	0	3	3
		%	.0%	1.1%	1.0%
	Detention Training Order	N.	2	2	4
		%	13.7%	.7%	1.4%
	CRO	N.	2	37	39
		%	13.7%	13.4%	13.4%
	CPO	N.	0	4	4
		%	.0%	1.4%	1.4%
	CPRO	N.	0	7	7
		%	.0%	2.5%	2.4%
	DTTO	N.	2	33	35
		%	13.3%	11.9%	12.0%
	Curfew	N.	0	5	5
		%	.0%	1.8%	1.7%
	Attendance Centre	N.	0	1	1
		%	.0%	.4%	.3%
	Supervision Order	N.	0	15	15
		%	.0%	5.4%	5.1%
	Fine	N.	0	31	31
		%	.0%	11.2%	10.6%
	Discharge	N.	1	40	41
		%	6.7%	14.4%	14.0%
	Referral Order	N.	0	20	20
		%	.0%	7.2%	6.8%
	Reparation Order	N.	0	2	2
		%	.0%	.7%	.7%
	CRASBO	N.	0	1	1
		%	.0%	.4%	.3%
	Costs	N.	0	1	1
		%	.0%	.4%	.3%
	Compensation	N.	0	5	5
		%	.0%	1.8%	1.7%
Total		N.	15	277	292
		%	100.0%	100.0%	100.0%

Chi-square = 27.117 Df = 16 P= 0.040



In most cases where the offence is committed whilst the offender is on bail, the decision to impose a community or custodial sentence could have been based on other factors. Only one case does not appear to involve any other factors affecting the seriousness of the offence which would explain the sentencing decision. The offender in case 097 had stolen cosmetics valued £45 from a shop whilst on bail. He was detained at the scene and immediately admitted the offence. The court imposed an 18-month CRO, which does not appear to be explainable by reference to any other *offence* related factor. The offender did, however, have 14 previous convictions, although only one of these was for a similar offence, which may have influenced the sentencing decision.

Custodial sentences were imposed in all five cases where the offence was committed whilst the offender was on prison licence. The sentence would have been determined in reference to the terms of the prison licence, rather than the seriousness of the offence. Indeed, cases 038 and 039 involved typical shopliftings, for which the offenders were each ordered to serve 14 days' imprisonment notwithstanding the fact that the offences may not have been sufficiently serious to cross the custody threshold.

### 5.13 Guilty Plea

The sentence discount for a guilty plea has its roots in the common law,<sup>43</sup> but was given legislative support in section 48 of the Criminal Justice and Public Order Act 1994, which was re-enacted in section 152 of the PCCSA 2000:

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<sup>43</sup> See for example, *de Haan* [1968] 2 QB 108

- “(1) In determining what sentence to pass on an offender who has pleaded guilty to an offence...a court shall take into account:
- (a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and
  - (b) the circumstances in which this indication was given.”

The legislation failed to provide guidance as to how much of a discount should be properly awarded, but case law had suggested that, “something of the order of one-third would very often be an appropriate discount from the sentence which would otherwise be imposed on a contested trial.”<sup>44</sup> Where the offender maintains a not guilty plea until later in the proceedings, the discount offered would be “substantially and visibly reduced from that which they would otherwise have earned.”<sup>45</sup> The discount for a guilty plea is often justified for pragmatic purposes; that the offender should be rewarded (by way of a sentence discount) for contributing to the expedient and effective running of the criminal justice system through the avoidance of a costly and lengthy trial.<sup>46</sup>

Only nine offenders within the sample pleaded not guilty. The offender in case 023 pleaded guilty to only part of the offence. This is the only case categorised as a ‘partial guilty plea’. He was charged with stealing two items from a hardware store. Whilst he admitted stealing one item (a roll of all-weather tape valued at £3), he maintained that the other item (a £40 bicycle lock) was his own; a claim not accepted by the court. The 22-year-old offender had 57 previous convictions, including 22 for theft. 32 convictions had led to a custodial sentence. 16 convictions had been recorded in the past year on 11 different occasions, all of which resulted in either fines or custodial sentences. Most of his recent offending behaviour centred on shoplifting. His sentence of three months’ imprisonment seems punitive but might have been influenced by his partial denial of the offence; he had after all only admitted the very low value part of the offence. His recent spate of offending might also

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<sup>44</sup> Per Taylor LCJ in *Buffrey* (1993) 14 Cr App R (S) 511, at 515, although see Henham (2001) who found that a large proportion of sentence discounts in the magistrates’ courts *exceed* one-third.

<sup>45</sup> Per Mellor J in *Oke and West* [1998] 2 Cr App R (S) 199, at 201

<sup>46</sup> A. Ashworth (2000), at 143

have led the court to conclude that a custodial sentence was appropriate, notwithstanding the fact that a number of such sentences had been tried in the recent past and each one had been followed shortly thereafter by a further conviction.

Six of the nine not guilty pleas (66.7%) led to the imposition of an immediate term of imprisonment, including one detention and training order. The offender in case 171 had worked as a waitress and was charged with stealing items from a customer's handbag. The victim had realised that her bag had been moved and that certain items were missing. The offender, who had 23 previous convictions including nine for theft, was convicted after a contested trial and was sentenced to two months' imprisonment. This decision to imprison may well have been based on a number of factors: the offender's not guilty plea, her list of recent convictions (for which she had received a number of fines and community penalties, the ineffectiveness of which may have led the magistrates to conclude that custody was now the only reasonable option), and the (albeit brief) professional relationship between the parties.

Case 190 involved a 33-year-old male offender with 68 previous convictions, 20 of which were for theft, who received a four month prison sentence for stealing £2000 worth of mobile telephone top-up cards from a supermarket. The sentence imposed was held to run concurrently to a four month term of imprisonment imposed upon the offender on the same day in case 189 following the offender's guilty plea for the theft of spirits worth £180 from a supermarket.

**Table 5.12 Sentence Type and Guilty Plea**

			Guilty Plea			Total
			Yes	No	Partial	
Sentence Type	Immediate custody	N.	72	5	1	78
		%	25.5%	55.6%	100.0%	26.7%
	Suspended sentence	N.	3	0	0	3
		%	1.1%	.0%	.0%	1.0%
	Detention Training Order	N.	3	1	0	4
		%	1.1%	11.1%	.0%	1.4%
	CRO	N.	38	1	0	39
		%	13.5%	11.1%	.0%	13.4%
	CPO	N.	4	0	0	4
		%	1.4%	.0%	.0%	1.4%
	CPRO	N.	7	0	0	7
		%	2.5%	.0%	.0%	2.4%
	DTTO	N.	35	0	0	35
		%	12.4%	.0%	.0%	12.0%
	Curfew	N.	5	0	0	5
		%	1.8%	.0%	.0%	1.7%
	Attendance Centre	N.	1	0	0	1
		%	.4%	.0%	.0%	.3%
	Supervision Order	N.	15	0	0	15
		%	5.3%	.0%	.0%	5.1%
	Fine	N.	30	1	0	31
		%	10.6%	11.1%	.0%	10.6%
	Discharge	N.	41	0	0	41
		%	14.5%	.0%	.0%	14.0%
	Referral Order	N.	20	0	0	20
		%	7.1%	.0%	.0%	6.8%
	Reparation Order	N.	2	0	0	2
		%	.7%	.0%	.0%	.7%
	CRASBO	N.	1	0	0	1
		%	.4%	.0%	.0%	.3%
	Costs	N.	1	0	0	1
		%	.4%	.0%	.0%	.3%
	Compensation	N.	4	1	0	5
		%	1.4%	11.1%	.0%	1.7%
Total		N.	282	9	1	292
		%	100.0%	100.0%	100.0%	100.0%

Chi-square = 21.270 Df = 32 P= 0.926

A custodial sentence was also imposed in case 203 concerning a 24-year-old male who stole a mobile telephone to the value of £50. The offender was seen in a snooker hall asking the patrons for money. The victim, a customer of the snooker hall, noticed his mobile phone was missing and followed the offender outside. Initially the offender denied taking the phone, but subsequently admitted to taking the property, asserting that he intended to return it. The offender had 18 previous convictions for theft, although other details of his previous history were not available. He entered a plea of not guilty and was sentenced to six weeks' imprisonment.

The final two cases in which an immediate custodial term was imposed following a not guilty plea are cases 290 and 291. Both cases concerned the same offender, an 18-year-old Asian male, who stole two mobile telephones on the same day. In the first count, the offender had enticed the 16-year-old victim into parkland and asked if he could borrow the victim's mobile phone. After the victim had agreed, the offender refused to return the phone to the owner and made threats that he was carrying a knife. On the same day, the offender had entered a take-away restaurant, the workplace of the second victim, noticed that the mobile telephone had been left unattended, took it and ran off making good his escape. He was subsequently arrested five days later and was sentenced by the Crown Court to a total of three months' imprisonment. Separate sentences for each count were not indicated.

A custodial sentence (in the guise of a detention and training order) was imposed on a 17-year-old offender in case 109. The offender, along with two others, entered an off-licence and stole a bottle of spirits valued at £17. The two others kept the shop worker occupied whilst the offender took the bottle. The offender was later identified but refused to disclose the identities of his two co-offenders. He had 62 previous convictions, including 12 for theft, and received a four month detention and training order.

In all of the cases where custody was imposed following a contested trial, there were other aggravating features that might explain the court's decision to imprison; be it a breach of a position of trust (case 171), the offender's prior criminal history (case 109, 171, 190 and 203), the value of the goods stolen (case 190), group offending (case 109), or the fact that the court was passing sentence for two or more offences at the same time (190, 290 and 291).

In those cases where the offender contested the case and custody was *not* imposed, the court was not averse to imposing a penalty toward the lower end of the sentencing spectrum. Firstly, the offender in case 003 was convicted of theft from a dwelling, having stolen the victim's mobile telephone. The victim was the offender's childminder whose house the offender had visited to drop off her child. The victim noticed the item had gone missing and claimed that the offender was the only person who could have taken it. The offender had only one previous conviction dating back seven years for being carried in a motor vehicle taken without consent. The offender was ordered to pay £200 compensation (reflecting the value of the goods taken but not recovered) and £90 costs. It is unlikely that the court would have imposed a lesser compensation order had the offender entered a guilty plea because the level of compensation is primarily set to reflect the value of the property stolen. The court might however have reduced the value of the costs order to reflect the admission but this would have been because the true costs of the court hearing would be greater where the offender pleads not guilty as this results in a longer (and therefore more costly) hearing. Reducing the costs for a guilty plea would not therefore amount to a discount for a guilty plea: it would simply reflect the lower costs of the hearing.

Similarly with case 213, the offender was convicted of one count of theft from a vehicle. Using force, he had smashed a car window to steal a handbag from the front passenger's

seat. The offence caused significant damage, which was redressed through the victim's insurance company. The offender had 58 previous convictions, 12 of which were for theft, but had only one conviction in the past year (that being shoplifting for which he received a conditional discharge). For the immediate offence, the court imposed a £75 fine and a costs order of £20. The fine may have been reduced to £50 had the offender entered a guilty plea, but either way this sentence could appear as particularly lenient considering the damage caused to the vehicle.

The only case where the offender received a community-based sentence following a not guilty plea was 030 in which a 16-year-old convicted for theft from a vehicle (namely stealing an in-car stereo system from a vehicle) was sentenced to a 24-month CRO and ordered to pay £80 costs. Details of the offence contained in the CPS file were comparatively thin and no details of the number and nature of the offender's previous convictions were available. Without knowing of any other aggravating factors it is difficult to make a judgement on the extent to which the not guilty plea might have impacted on sentence.

#### 5.13.1 Time of Guilty Plea

It is a long standing principle that the extent of a sentencing discount attracted to a guilty plea is linked to the time the plea was entered.<sup>47</sup> This has more recently been incorporated in the Sentencing Guidelines Council, which suggests that a discount of one-third should be applied for offenders who enter a plea at the first reasonable opportunity. This should be

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<sup>47</sup> See for example *Rafferty* [1998] 2 Cr App R (S) 449, although see Henham (2001) who found that no statistical relationship existed between the timing of the guilty plea and the size of the discount granted by the magistrates' courts; at page 83.

reduced to one-quarter after a trial date has been set, and falls to one-tenth where the offender changes his plea after the trial has begun.<sup>48</sup>

There appears to be a correlation between the time of confession and the imposition of an immediate custodial sentence, which becomes increasingly likely the later the plea is entered. Consequently, those offenders who entered a guilty plea immediately after the offence were the least likely group to receive an immediate custodial sentence with 18 (14.3%) being made subject to that penalty. This proportion increases to 50% where the offender enters a late guilty plea after having been charged.

#### 5.14 Conclusions

Most theft cases are not considered to be sufficiently serious to justify committing the case to the Crown Court for sentencing. However, in a small minority of cases, the magistrates appear to do so where they consider the seriousness of the offence to be such that their sentencing powers may be inadequate. That being said, the Crown Court may not ultimately impose a sentence outside of the jurisdiction of the magistrates' court. The factors likely to lead the magistrates to decline jurisdiction are a serious breach of trust and the targeting of high value property.

As the primary determinant in ascertaining harm, the monetary value of the property appears to have a bearing on the sentencing decision. In high value thefts, the courts are more likely to regard the seriousness of the offence as sufficient to cross the custody or community-sentence thresholds. Damage caused during the course of the theft can have an

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<sup>48</sup> SGC (2007), at 5



impact on the sentencing decision. Where significant damage is caused, the court is more likely to impose a custodial sentence.

Offending by an organised group did not have such a marked impact on sentence as may have been expected. Generally, offences committed by groups were otherwise non-serious; therefore the courts may not regard the factor as sufficient aggravation to justify the imposition of a more punitive sentence type than would otherwise be appropriate. The impact of related damage was, as expected, dependent upon the extent of the damage caused. In cases involving significant damage, where the costs of repair or replacement extend to hundreds of pounds, the courts were likely to regard the seriousness of the offence as having crossed the custody threshold.

Ultimately, in most cases resulting in a custodial or community-based sentence, there is no single offence-related factor which appears to adequately explain the courts' decision. The imposition of these more punitive sentences, rather than a fine or discharge, may be based on the presence of a combination of offence-related factors and/or the offender's character, which is the focus of Chapter Six.

## **CHAPTER SIX**

### **IMPACT OF PARTICIPANTS' CHARACTERISTICS ON THE SENTENCING DECISION**

The previous chapter examined offence-related factors which may have impacted on the sentencing decision in the study's sample of cases. Here, the focus moves away from the offence and toward the parties to the crime in order to determine whether the offender's characteristics and circumstances (such as gender, age, ethnicity, previous convictions and previous sentences served) may have affected the sentence outcome. Similarly, the characteristics of the victim are also explored. However, it should be noted that there was no apparent statistical significance between most offender and victim characteristics and the sentence imposed, although the offender's previous convictions and prior sentences served nevertheless seemed to have some influence on the sentence.

#### **6.1 The Offender**

##### **6.1.1 Offender Gender**

The overwhelming majority (76 percent) of thefts in the sample were committed against retailers. A higher proportion of the female offenders within the sample (83.6 percent) were convicted of these offences compared to the male offenders (73.5 percent), explainable in part by the fact that female offenders seem to have a narrower offending range than their

male counterparts. Whereas examples can be found of males offending in every category of theft (including abstraction of electricity), no females were convicted of theft from a vehicle, of a vehicle, abstraction, theft by finding, of a bicycle or mobile phone.

Table 6.1 shows the relationship between sentence type and offender gender. Most sentence types were used equally against both male and female offenders. However, females were less likely to be issued with a DTTO (only two of the 35 DTTOs within the sample were imposed against female offenders), and fines were imposed relatively infrequently against female offenders, a finding consistent with other research.<sup>1</sup> Conversely, females were more likely than male offenders to be made the subject of a CRO (24.7 percent compared with 9.6 percent of male offenders).<sup>2</sup> Referral and supervision orders were also more commonly imposed against female offenders (26 percent compared with 7.3 percent of male offenders), although this is explained by the over representation of young female offenders within the sample.

Table 6.1 seemingly shows a significantly greater use of referral orders and supervision orders against female offenders, with 55 percent of referral orders and 53.3 percent of supervision orders being imposed against female offenders, despite the fact that females constituted only 25 percent of the sample. The study included a relatively high number of young female offenders who would often be sentenced to one of these two youth orders. 23 of the 73 female offenders were aged under 18 at the time of the offence, constituting 31.5

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<sup>1</sup> Hedderman & Dowds (1997), at 2; Hedderman and Gelsthorpe (1997), at 21 where the authors suggest that the courts' reluctance to fine female offenders may be based on a belief that to do so would be to penalise her children. More generally, Jacobson & Hough (2007), at 33 found that some sentencers were inclined to take into account the interests of any children, which was more likely to be an issue when dealing with female offenders.

<sup>2</sup> Whilst Speed and Burrows (2006) found that male offenders were twice as likely as females to receive a custodial sentence (30 per cent c.f. 15 per cent), females were more likely to be sentenced within the community (36 per cent c.f. 31 per cent of males); at page 41.

percent of the female sample population, compared with only 12.8 percent of male offenders who were aged under 18.<sup>3</sup>

**Table 6.1 Sentence Type and Offender Gender**

			Offender Gender		Total
			Male	Female	
Sentence Type	Immediate custody	N	64	14	78
		%	82.1%	17.9%	100.0%
	Suspended sentence	N	2	1	3
		%	66.7%	33.3%	100.0%
	Detention Training Order	N	4	0	4
		%	100.0%	.0%	100.0%
	CRO	N	21	18	39
		%	53.8%	46.2%	100.0%
	CPO	N	3	1	4
		%	75.0%	25.0%	100.0%
	CPRO	N	7	0	7
		%	100.0%	.0%	100.0%
	DTTO	N	33	2	35
		%	94.3%	5.7%	100.0%
	Curfew	N	5	0	5
		%	100.0%	.0%	100.0%
	Attendance Centre	N	1	0	1
		%	100.0%	.0%	100.0%
	Supervision Order	N	7	8	15
		%	46.7%	53.3%	100.0%
	Fine	N	26	5	31
		%	83.9%	16.1%	100.0%
	Discharge	N	29	12	41
		%	70.7%	29.3%	100.0%
	Referral Order	N	9	11	20
		%	45.0%	55.0%	100.0%
	Reparation Order	N	2	0	2
		%	100.0%	.0%	100.0%
	CRASBO	N	1	0	1
		%	100.0%	.0%	100.0%
	Costs	N	1	0	1
		%	100.0%	.0%	100.0%
	Compensation	N	4	1	5
		%	80.0%	20.0%	100.0%
Total		N	219	73	292
		%	75.0%	25.0%	100.0%

Chi-Square = 43.218 Df = 16 P = 0.000

<sup>3</sup> Youth sentencing is considered below in section 6.1.2.1

### 6.1.2 Offender Age

The penalties available for the courts' utilisation vary depending on the age of the offender.<sup>4</sup> Simply put, the courts have at their disposal a different set of sentencing options when dealing with young offenders than those available for adult offenders, although there is some overlap. Fines and discharges are available for all offenders, regardless of age group.

The purposes of sentencing are statutorily affected by offenders' age. The Criminal Justice Act 1991 required sentences to be determined in reference to offence seriousness, thereby upholding principles of proportionality. For young offenders on the other hand, section 37 of the Crime and Disorder Act 1998 states that "the principal aim of the youth justice system [is] to prevent offending by children and young persons", whilst section 44 of the Children and Young Persons Act 1933 provides that the court must "have regard to the welfare of the child or young person." This could mean, therefore, that the courts may be less inclined to impose a custodial sentence upon a young offender, preferring instead to opt for a rehabilitative and supportive disposal option.

Table 6.2 shows the relationship between offender age and sentence type imposed. As outlined above, some penalty types are only available for particular age groups, thereby accounting for the fact that all referral orders, supervision orders and detention and training orders were imposed on offenders under the age of 18.

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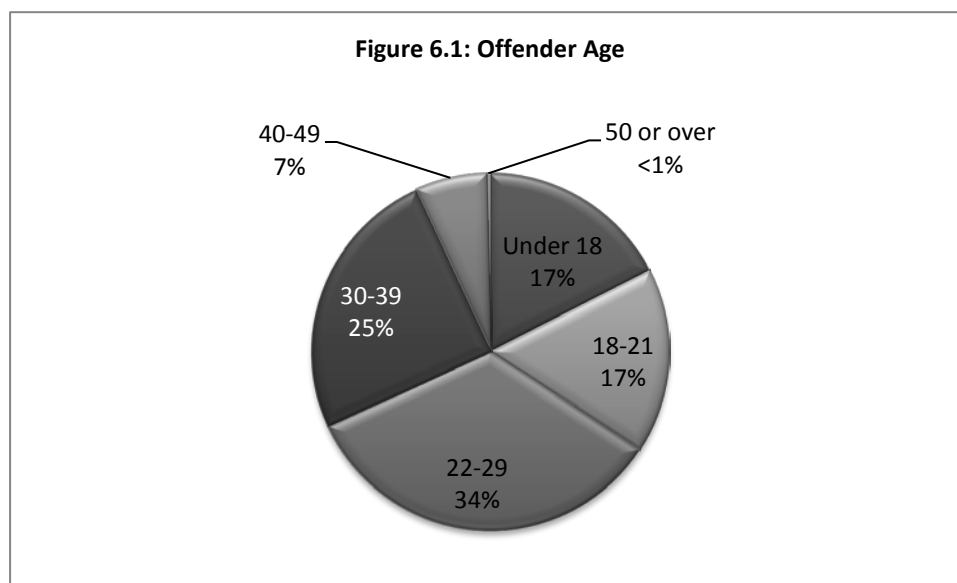
<sup>4</sup> See section 2.5 above.

**Table 6.2 Sentence Type and Offender Age**

			Offender Age						Total
			Under 18	18-21	22-29	30-39	40-49	50-59	
Sentence Type	Immediate custody	N	0	14	40	24	0	0	78
		%	.0%	17.9%	51.3%	30.8%	.0%	.0%	100.0%
	Suspended sentence	N	0	0	1	2	0	0	3
		%	.0%	.0%	33.3%	66.7%	.0%	.0%	100.0%
	Detention Training Order	N	4	0	0	0	0	0	4
		%	100.0%	.0%	.0%	.0%	.0%	.0%	100.0%
	CRO	N	2	11	11	13	2	0	39
		%	5.1%	28.2%	28.2%	33.3%	5.1%	.0%	100.0%
	CPO	N	0	0	1	2	1	0	4
		%	.0%	.0%	25.0%	50.0%	25.0%	.0%	100.0%
	CPRO	N	0	6	0	1	0	0	7
		%	.0%	85.7%	.0%	14.3%	.0%	.0%	100.0%
	DTTO	N	0	4	20	8	3	0	35
		%	.0%	11.4%	57.1%	22.9%	8.6%	.0%	100.0%
	Curfew	N	0	2	1	2	0	0	5
		%	.0%	40.0%	20.0%	40.0%	.0%	.0%	100.0%
	Attendance Centre	N	1	0	0	0	0	0	1
		%	100.0%	.0%	.0%	.0%	.0%	.0%	100.0%
	Supervision Order	N	15	0	0	0	0	0	15
		%	100.0%	.0%	.0%	.0%	.0%	.0%	100.0%
	Fine	N	2	8	10	8	3	0	31
		%	6.5%	25.8%	32.3%	25.8%	9.7%	.0%	100.0%
	Discharge	N	5	2	14	11	8	1	41
		%	12.2%	4.9%	34.1%	26.8%	19.5%	2.4%	100.0%
	Referral Order	N	20	0	0	0	0	0	20
		%	100.0%	.0%	.0%	.0%	.0%	.0%	100.0%
	Reparation Order	N	2	0	0	0	0	0	2
		%	100.0%	.0%	.0%	.0%	.0%	.0%	100.0%
	CRASBO	N	0	0	0	1	0	0	1
		%	.0%	.0%	.0%	100.0%	.0%	.0%	100.0%
	Costs	N	0	1	0	0	0	0	1
		%	.0%	100.0%	.0%	.0%	.0%	.0%	100.0%
	Compensation	N	0	1	1	1	2	0	5
		%	.0%	20.0%	20.0%	20.0%	40.0%	.0%	100.0%
Total		N	51	49	99	73	19	1	292
		%	17.5%	16.8%	33.9%	25.0%	6.5%	.3%	100.0%

Chi-Square = 324.194 Df = 80 P = 0.000

The study's sample of cases includes offences committed by persons spanning a wide age range, the youngest offender being 12 years old (case 224) and the oldest 54 (case 176). Offending was relatively rare in those aged over 40,<sup>5</sup> but was commonplace in all other age groups, as shown in Figure 6.1 below. Offending was most common amongst the 22-29 year olds, with 99 offenders (33.9 percent) falling into this age bracket.



### 6.1.2.1 Young Offenders

Despite the statutory guidance to the contrary, on nine occasions the courts imposed a referral order on a young offender with one previous conviction.<sup>6</sup> The referral order was imposed in all 11 cases involving first-time young offenders.

<sup>5</sup> 20 cases involved offenders aged 40 or over. In only one of these was the offender over the age of 50.

<sup>6</sup> When enacted, section 35 of the Criminal Justice and Immigration Act 2008 will amend section 17 of the PCCSA 2000 thereby providing the court with a discretion to impose a referral order on an offender who has been dealt with by the court on one previous occasion and, exceptionally, where he has been dealt with by a court on more than one previous occasion but has only been referred once in the past.

### 6.1.3 Offender Ethnicity

Table 6.3 shows the relationship between offender ethnicity and sentence type imposed. Ethnicity was categorised in accordance with the categories given on the police charge sheet within the CPS file, thereby detailing the ethnicity as given in court. Of the 292 offenders within the sample, 254 (87.0 percent) were white and 36 (12.3 percent) were non-white. The 36 non-white offenders were divided as followed: six (2.1 percent) dark European, 17 (5.8 percent) Afro-Caribbean, 11 (3.8 percent) Asian and two (0.7 percent) Arabian. The offender's ethnicity was unknown in two cases (0.7 percent).



**Table 6.3 Sentence Type and Offender Ethnicity**

			Offender Ethnicity Police						Total
			White	Dark European	African Caribbean	Asian	Arab	Unknown	
Sentence Type	Immediate custody	N	65	0	4	8	1	0	78
		%	83.3%	.0%	5.1%	10.3%	1.3%	.0%	100.0%
	Suspended sentence	N	3	0	0	0	0	0	3
		%	100.0%	.0%	.0%	.0%	.0%	.0%	100.0%
	Detention Training Order	N	2	1	0	1	0	0	4
		%	50.0%	25.0%	.0%	25.0%	.0%	.0%	100.0%
	CRO	N	35	1	2	0	0	1	39
		%	89.7%	2.6%	5.1%	.0%	.0%	2.6%	100.0%
	CPO	N	4	0	0	0	0	0	4
		%	100.0%	.0%	.0%	.0%	.0%	.0%	100.0%
	CPRO	N	7	0	0	0	0	0	7
		%	100.0%	.0%	.0%	.0%	.0%	.0%	100.0%
	DTTO	N	33	1	1	0	0	0	35
		%	94.3%	2.9%	2.9%	.0%	.0%	.0%	100.0%
	Curfew	N	5	0	0	0	0	0	5
		%	100.0%	.0%	.0%	.0%	.0%	.0%	100.0%
	Attendance Centre	N	1	0	0	0	0	0	1
		%	100.0%	.0%	.0%	.0%	.0%	.0%	100.0%
	Supervision Order	N	12	1	2	0	0	0	15
		%	80.0%	6.7%	13.3%	.0%	.0%	.0%	100.0%
	Fine	N	26	0	4	0	1	0	31
		%	83.9%	.0%	12.9%	.0%	3.2%	.0%	100.0%
	Discharge	N	34	0	4	2	0	1	41
		%	82.9%	.0%	9.8%	4.9%	.0%	2.4%	100.0%
	Referral Order	N	18	2	0	0	0	0	20
		%	90.0%	10.0%	.0%	.0%	.0%	.0%	100.0%
	Reparation Order	N	2	0	0	0	0	0	2
		%	100.0%	.0%	.0%	.0%	.0%	.0%	100.0%
	CRASBO	N	1	0	0	0	0	0	1
		%	100.0%	.0%	.0%	.0%	.0%	.0%	100.0%
	Costs	N	1	0	0	0	0	0	1
		%	100.0%	.0%	.0%	.0%	.0%	.0%	100.0%
	Compensation	N	5	0	0	0	0	0	5
		%	100.0%	.0%	.0%	.0%	.0%	.0%	100.0%
Total	N	254	6	17	11	2	2	292	
	%	87.0%	2.1%	5.8%	3.8%	.7%	.7%	100.0%	

Chi-Square = 62.379 Df = 80 P = 0.927

#### 6.1.4 Offender's Employment

Attention now turns to the offender's employment status at the time of sentencing. The aim here is to discover whether there was any evidence that employment may dissuade the court from imposing an intrusive sentence, such as custody or a community punishment order, which might interfere with the offender's job.<sup>7</sup> The CPS files included information on the offender's employment at the time of the offence but would occasionally include additional information regarding whether that employment had been terminated, as may very well be true in cases where the offender was convicted of theft by an employee. Unfortunately, it cannot be said with certainty that any changes in employment status were *always* noted on the CPS file. Where the offender has lost his employment as a consequence of the offence, the court may continue to sentence as an unemployed offender. Employment at the time of sentence is considered here to potentially play a greater role than employment status at the time of the offence since the court may be dissuaded from imposing a sanction which is likely to interfere with the offender's employment. Where the offender has lost employment between offence and sentence, this would presumably no longer factor in the court's mind. Conversely, where the offender was unemployed at the time of the offence but has subsequently found employment before being sentenced, the court may wish to take this fact into account.

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<sup>7</sup> Jacobson & Hough (2007), at 37 found that a good work record can be very influential at the sentencing stage for two main reasons. Firstly, the courts would be wary of the risk of damaging an offender's long-term economic prospects by imposing a custodial sentence. Secondly, an employed offender may be able to demonstrate himself as reasonably responsible, organised and (perhaps) less likely to reoffend.

**Table 6.4 Sentence Type & Offender Employment**

		Offender Employment										Total
		None	Manager	Admin	Skilled trade	Personal service	Sales	Machinery operator	Elementary occupation	Student	Unknown	
Sentence Type	Immediate custody	N 63	1	0	3	3	2	0	5	0	1	78
	%	80.8%	1.3%	.0%	3.8%	3.8%	2.6%	.0%	6.4%	.0%	1.3%	100.0%
Suspended sentence	N	2	0	0	0	0	0	1	0	0	0	3
	%	66.7%	.0%	.0%	.0%	.0%	.0%	33.3%	.0%	.0%	.0%	100.0%
Detention Training Order	N	2	0	0	0	0	0	0	0	2	0	4
	%	50.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	50.0%	.0%	100.0%
CRO	N	28	0	4	2	0	1	0	1	2	1	39
	%	71.8%	.0%	10.3%	5.1%	.0%	2.6%	.0%	2.6%	5.1%	2.6%	100.0%
CPO	N	2	0	0	0	0	0	2	0	0	0	4
	%	50.0%	.0%	.0%	.0%	.0%	.0%	50.0%	.0%	.0%	.0%	100.0%
CPRO	N	7	0	0	0	0	0	0	0	0	0	7
	%	100.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	100.0%
DTTO	N	35	0	0	0	0	0	0	0	0	0	35
	%	100.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	100.0%
Curfew	N	4	0	0	1	0	0	0	0	0	0	5
	%	80.0%	.0%	.0%	20.0%	.0%	.0%	.0%	.0%	.0%	.0%	100.0%
Attendance Centre	N	0	0	0	0	0	0	0	0	1	0	1
	%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	100.0%	.0%	100.0%
Supervision Order	N	2	0	0	0	0	0	0	0	13	0	15
	%	13.3%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	86.7%	.0%	100.0%
Fine	N	22	0	0	0	0	0	2	3	4	0	31
	%	71.0%	.0%	.0%	.0%	.0%	.0%	6.5%	9.7%	12.9%	.0%	100.0%
Discharge	N	35	0	0	0	0	0	1	0	3	2	41
	%	85.4%	.0%	.0%	.0%	.0%	.0%	2.4%	.0%	7.3%	4.9%	100.0%
Referral Order	N	1	0	0	0	0	0	1	1	15	2	20
	%	5.0%	.0%	.0%	.0%	.0%	.0%	5.0%	5.0%	75.0%	10.0%	100.0%
Reparation Order	N	1	0	0	0	0	0	0	0	1	0	2
	%	50.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	50.0%	.0%	100.0%
CRASBO	N	1	0	0	0	0	0	0	0	0	0	1
	%	100.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	100.0%
Costs	N	1	0	0	0	0	0	0	0	0	0	1
	%	100.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	100.0%
Compensation	N	5	0	0	0	0	0	0	0	0	0	5
	%	100.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	100.0%
Total	N	211	1	4	6	3	3	7	10	41	6	292
	%	72.3%	.3%	1.4%	2.1%	1.0%	1.0%	2.4%	3.4%	14.0%	2.1%	100.0%

Chi-Square = 113.606 Df = 36 P = 0.000

Where an offender was employed at the time of the offence, his employment status was classified according to the *Standard Occupational Classification*.<sup>8</sup> This scheme provides nine groups according to the type of work conducted or the offender's level of authority in the workplace.<sup>9</sup> It also lists many common occupations within each group. Additional classifications were added to incorporate the two largest offender groups in the sample: students and the unemployed.

Table 6.4 shows the relationship between the offender's employment at the time of the offence and the sentence type imposed. Where the offender was employed at the time of the offence, the employment was known to have been terminated following the offence in only three cases, all of which involved the offender stealing from his employer and resulted in the imposition of a custodial sentence. In all other cases in which the offender was employed at the time of the offence, it was not known whether that employment had ended before sentence was passed. Therefore it is difficult to state conclusively the extent to which the offender's employment status impacted upon the sentencing decision.

#### 6.1.5 Previous Convictions

Table 6.5 shows the relationship between the sentence type imposed and the number of previous convictions. Evidence suggests that criminality often begins during the formative

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<sup>8</sup> Office of National Statistics (2000)

<sup>9</sup> The nine classes are managers and senior officials, professions, associate professional and technical occupations, administrative and secretarial, skilled trades, personal service, sales and customer service, process plant and machine operatives, and elementary occupations.

years of youth,<sup>10</sup> leading to many first offenders being young offenders. Indeed, many have claimed that youth is the most criminogenic age.<sup>11</sup> 40.7 percent of offenders with no previous convictions were under the age of 18. Young offenders also accounted for the 71 percent of offenders with one to three convictions. Female offenders were more likely than their male counterparts to have fewer than four prior convictions, although this is explicable (at least in part) by the relatively large number of young female offenders in the sample.

Although previous convictions were not statistically significant to the sentence imposed, the Table indicates a tendency for repeat offenders to receive custodial or community sentences. In most cases, this is explicable by reference to the greater seriousness of the offending, whilst other cases might offer some evidence of the courts sentencing on record. Case 023 involved the theft of hardware valued £45. The offender had accumulated 57 previous convictions, 22 of which were for theft, with nine theft convictions in the last year. He was ordered to serve a three month prison term. In case 144, the offender had stolen perfume valued £66. The offender was detained at the scene, the property was recovered and a guilty plea was entered; there was no apparent offence aggravation present. The offender had 44 previous convictions, 22 for thefts, with seven shopliftings being recorded in the past year. He was sentenced to 28 days' imprisonment. Case 059 concerned a female offender who had stolen food valued £60. Similarly to case 144, there was no apparent offence aggravation. The offender had 19 previous convictions, 14 of which were for similar thefts, including 13 theft convictions in the year preceding the immediate offence. He was sentenced to four months' imprisonment. It appears that the only explanation for the decision to imprison her is based on her record and the frequency of recent theft offending in particular.

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<sup>10</sup> See for example, Lynch, Ogilvie & Chui (2003), at 45

<sup>11</sup> Farrington (2007); Muncie (2004), chapter 1; A. Rutherford (2002), at 35

That being said, a lengthy record need not necessitate a more punitive sentence. In seven cases, the offender had amassed 60 or more previous convictions *for theft*, all of which were dealt with by non-custodial measures. The seven cases involved offending against shops with no obvious offence aggravation. In each case, the offender's significant criminal history was not enough to lead the court to impose a custodial sentence. Indeed in case 162 in which the offender had stolen from a shop alcohol valued £3.50, the court imposed a twelve month conditional discharge, notwithstanding the offender's history of 119 previous convictions including 79 thefts.

The Table shows that referral orders were imposed on nine offenders with one previous conviction, despite the fact that no such power existed at the time. Before the enactment of section 35 of the Criminal Justice and Immigration Act 2008, the referral order could only be imposed on first-time young offenders who pleaded guilty to their offences and for whom the courts were not considering imposing a custodial sentence or absolute discharge.

**Table 6.5 Sentence Type and Previous Convictions**

			Previous Convictions									Total	
			None	1	2-3	4-9	10-29	30-59	60-99	100+	No details		Incomplete details
Sentence Type	Immediate custody	N	4	0	0	5	17	22	17	9	4	0	78
		%	5.1%	.0%	.0%	6.4%	21.8%	28.2%	21.8%	11.5%	5.1%	.0%	100.0%
	Suspended sentence	N	0	1	0	0	0	1	0	0	0	1	3
		%	.0%	33.3%	.0%	.0%	.0%	33.3%	.0%	.0%	.0%	33.3%	100.0%
	Detention Training Order	N	0	0	0	1	1	0	2	0	0	0	4
		%	.0%	.0%	.0%	25.0%	25.0%	.0%	50.0%	.0%	.0%	.0%	100.0%
	CRO	N	4	0	1	5	9	11	1	4	2	2	39
		%	10.3%	.0%	2.6%	12.8%	23.1%	28.2%	2.6%	10.3%	5.1%	5.1%	100.0%
	CPO	N	2	0	0	0	0	0	1	0	1	0	4
		%	50.0%	.0%	.0%	.0%	.0%	.0%	25.0%	.0%	25.0%	.0%	100.0%
	CPRO	N	0	0	1	3	2	1	0	0	0	0	7
		%	.0%	.0%	14.3%	42.9%	28.6%	14.3%	.0%	.0%	.0%	.0%	100.0%
	DTTO	N	0	0	0	8	10	3	7	4	2	1	35
		%	.0%	.0%	.0%	22.9%	28.6%	8.6%	20.0%	11.4%	5.7%	2.9%	100.0%
	Curfew	N	0	0	0	1	0	4	0	0	0	0	5
		%	.0%	.0%	.0%	20.0%	.0%	80.0%	.0%	.0%	.0%	.0%	100.0%
	Attendance Centre	N	0	1	0	0	0	0	0	0	0	0	1
		%	.0%	100.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	100.0%
	Supervision Order	N	0	3	2	2	6	1	0	0	1	0	15
		%	.0%	20.0%	13.3%	13.3%	40.0%	6.7%	.0%	.0%	6.7%	.0%	100.0%
	Fine	N	3	2	3	3	8	6	2	2	2	0	31
		%	9.7%	6.5%	9.7%	9.7%	25.8%	19.4%	6.5%	6.5%	6.5%	.0%	100.0%
	Discharge	N	3	3	2	5	12	6	6	3	0	1	41
		%	7.3%	7.3%	4.9%	12.2%	29.3%	14.6%	14.6%	7.3%	.0%	2.4%	100.0%
	Referral Order	N	11	9	0	0	0	0	0	0	0	0	20
		%	55.0%	45.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	100.0%
	Reparation Order	N	0	0	2	0	0	0	0	0	0	0	2
		%	.0%	.0%	100.0%	.0%	.0%	.0%	.0%	.0%	.0%	.0%	100.0%
CRASBO	N	0	0	0	0	0	1	0	0	0	0	1	
	%	.0%	.0%	.0%	.0%	.0%	100.0%	.0%	.0%	.0%	.0%	100.0%	
Costs	N	0	0	0	0	1	0	0	0	0	0	1	
	%	.0%	.0%	.0%	.0%	100.0%	.0%	.0%	.0%	.0%	.0%	100.0%	
Compensation	N	0	1	0	0	3	0	0	0	1	0	5	
	%	.0%	20.0%	.0%	.0%	60.0%	.0%	.0%	.0%	20.0%	.0%	100.0%	
Total		N	27	20	11	33	69	56	36	22	13	5	292
		%	9.2%	6.8%	3.8%	11.3%	23.6%	19.2%	12.3%	7.5%	4.5%	1.7%	100.0%

Chi-Square = 330.346 Df = 144 P = 0.000

The Table also shows that offenders in four cases received an immediate custodial sentence for their first offence. Each of these was heard in the Crown Court and were all particularly serious examples of theft. The offender in cases 282-284 had stolen bank cards belonging to two elderly victims over whom the offender acted as a carer. She had used one card to withdraw cash from the victim's bank account, and used the other to fraudulently purchase goods. She was sentenced to concurrent 18-month terms of imprisonment for each count. The offender in case 292 was a store manager who had appropriated £27,000 by authorising dishonest refunds. The Crown Court ordered that he serve 12 months in prison, no doubt due to the overwhelming presence of aggravating features: the high value of the property, breach of trust, and the sophisticated methods used to conceal his actions.

#### 6.1.6 Previous Sentences

This section will deal with offenders' previously served sentences (if any). The issue for consideration here is whether the offender had previously received the same sentence type for one or more of his prior convictions as imposed for the current theft. This is particularly relevant to the consideration of discharges which do not, strictly speaking, constitute a punishment. There could be reason to claim that the leniency of a discharge should only be offered to an offender once. The question is also relevant to some community sentences, particularly those which seek to reduce the offender's propensity to reoffend through rehabilitation (e.g. CRO and DTTO). The court may understandably feel that reoffending indicates that any previous sentence has not been effective and ought therefore not to be imposed on a subsequent conviction. Table 6.6 shows the number of cases in which offenders had previously been made subject to the same order for an earlier conviction.



In most instances the CPS case file included a list of previous convictions along with the sentence imposed for each and the date on which they were sentenced. Only in the Crown Court would there be a (albeit brief) précis of the offence facts. In 22 cases the list was either missing or incomplete to an extent that the question of whether the same sentence had been imposed of the offender in the past could not be addressed.

Table 6.6 shows that the courts were not averse to imposing the same type of sentence on an offender as he had been subject to before. In many cases the offender may have received the same sentence type on two or more occasions. Not surprisingly, in the majority of cases (71.8 percent) where a term of immediate custody was imposed, the same sentence type had been imposed on the offender on more than one occasion.

**Table 6.6 Sentence Type and Previously Received Same Sentence Type**

			Previously Received Same Sentence Type				Total
			No	Yes - once	Yes - more than once	Unknown	
Sentence Type	Immediate custody	N	14	3	56	5	78
		%	17.9%	3.8%	71.8%	6.4%	100.0%
	Suspended sentence	N	1	0	1	1	3
		%	33.3%	.0%	33.3%	33.3%	100.0%
	Detention Training Order	N	2	0	2	0	4
		%	50.0%	.0%	50.0%	.0%	100.0%
	CRO	N	14	7	13	5	39
		%	35.9%	17.9%	33.3%	12.8%	100.0%
	CPO	N	3	0	0	1	4
		%	75.0%	.0%	.0%	25.0%	100.0%
	CPRO	N	4	1	2	0	7
		%	57.1%	14.3%	28.6%	.0%	100.0%
	DTTO	N	21	4	6	4	35
		%	60.0%	11.4%	17.1%	11.4%	100.0%
	Curfew	N	5	0	0	0	5
		%	100.0%	.0%	.0%	.0%	100.0%
	Attendance Centre	N	1	0	0	0	1
		%	100.0%	.0%	.0%	.0%	100.0%
	Supervision Order	N	4	2	7	2	15
		%	26.7%	13.3%	46.7%	13.3%	100.0%
	Fine	N	8	5	16	2	31
		%	25.8%	16.1%	51.6%	6.5%	100.0%
	Discharge	N	15	2	23	1	41
		%	36.6%	4.9%	56.1%	2.4%	100.0%
	Referral Order	N	15	5	0	0	20
		%	75.0%	25.0%	.0%	.0%	100.0%
	Reparation Order	N	2	0	0	0	2
		%	100.0%	.0%	.0%	.0%	100.0%
	CRASBO	N	1	0	0	0	1
		%	100.0%	.0%	.0%	.0%	100.0%
	Costs	N	0	0	1	0	1
		%	.0%	.0%	100.0%	.0%	100.0%
	Compensation	N	2	1	1	1	5
		%	40.0%	20.0%	20.0%	20.0%	100.0%
Total		N	112	30	128	22	292
		%	38.4%	10.3%	43.8%	7.5%	100.0%

Chi-Square = 99.416 Df = 48 P = 0.000

#### 6.1.6.1 Discharges

It is arguable that an offender should only be discharged once where they can legitimately claim that their offence was a lapse into criminality which was out of character. However, the courts appear willing to impose a number of discharges upon an offender. Of the 41 cases where a discharge was imposed, the offender had previously received the same sentence type in 25 cases (61.0 percent), and had received a discharge in the past on more than one occasion in 23 of these (56.1 percent of the cases in which a discharge was imposed). In 18 cases the offender had previously received a discharge for theft.

In some of those cases where an offender received a discharge and had been previously subject to a similar order on one or more occasions, the court may have been swayed by a significant break in the person's offending behaviour. By way of example, in case 062 the offender received a 12 month conditional discharge for theft from a shop having received similar orders for assault occasioning actual bodily harm in 1994 and shoplifting in 1996. Her last recorded offence was for shoplifting in 1999, for which she received a £50 fine. Similarly, in case 088 the offender was made subject of a six-month conditional discharge following a guilty plea for shoplifting, having previously received four 12-month conditional discharges for shoplifting in 1988, 1994 and 1997. Her last offence recorded was for shoplifting in 1998 (six years before the current offence) for which she was handed a £200 fine. Equally, case 207 involved an offender sentenced to a 12-month conditional discharge for a low-level theft from a shop. The courts had previously imposed discharges on him in 1987 and 1998 for making a false statement to obtain benefits and criminal damage respectively. His last recorded offence was in 1999 for damaging property and breaching a conditional discharge.

#### 6.1.6.2 Rehabilitative Community Sentences

Where the court has previously imposed a sentence aimed at rehabilitating the offender, such as a DTTO or CRO, and where that order had failed to prevent subsequent criminality by the offender, it may be assumed that the court would be discouraged from imposing further similar orders. The court may believe that, as the orders had previously been ineffective, they may remain inappropriate for a particular offender unless a change in circumstances suggests otherwise.

A DTTO was imposed in 35 cases, in 21 of which (60 percent) the offender had not previously been subject to a DTTO. In ten cases (28.5 percent) the offender was known to have previously received a DTTO, including six cases where the offender had received an order on more than one occasion. In some cases an earlier DTTO was still active and further DTTOs would be ordered to run concurrently to the earlier orders (for example, cases 172 and 185 where the DTTOs were ordered to run concurrently to that imposed in cases 164-167). Not only does it appear that the courts are willing to allow a DTTO to continue, despite reoffending, but the courts may not be discouraged from imposing a further DTTO once an earlier order has expired. For example, the offender in cases 253-255 (three counts of shoplifting all simultaneously sentenced for by way of a DTTO) had previously received similar orders four years and two years earlier, neither of which appear to have changed the offender's criminal behaviour. The earlier orders' failure to abate the offender's criminal behaviour did not deter the court from imposing a fresh DTTO.

A CRO was imposed in 39 cases, 14 of which (35.9 percent) were imposed on an offender for the first time. In 20 cases (51.2 percent), the offender was known to have previously been made the subject of a CRO (or its predecessor, the probation order).<sup>12</sup> These include 13 cases (33.3 percent) where the offender had previously received a CRO on more than one occasion. These included instances where previous orders had failed to reduce reoffending but had been ordered to continue (for example case 173 in which the court imposed a nine month CRO concurrent to a similar order imposed three months earlier for shoplifting).

## 6.2 The Victim

This section will consider statistical analysis of the relationship between the victim's characteristics and the sentence. Factors relating to the victim may be relevant to the determination of offence seriousness. Where an offender specifically targets a victim on the grounds of vulnerability or racial ethnicity, the seriousness of the offence may be affected. In its guideline on offence seriousness, the Sentencing Guidelines Council identifies the "deliberate targeting of vulnerable victims" and offences "motivated by hostility towards a minority group" as factors indicating higher culpability.<sup>13</sup> Victim vulnerability is also named as a factor relating to an increased degree of harm.<sup>14</sup>

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<sup>12</sup> In the remaining five cases the missing or incomplete data concerning previous sentences meant that it was unknown whether or not the offender had previously been subject to a CRO.

<sup>13</sup> Sentencing Guidelines Council (2004a), at 6

<sup>14</sup> Ibid, at 7

### 6.2.1 Nature of the Victim

Figures relating to the distinction between individual and business victims is shown in Table 6.8. This shows that offences committed against individuals were unlikely to receive either a fine or a discharge, with these penalties being imposed in only one and four cases respectively. A community sentence was imposed in 15 cases, immediate imprisonment in a further 15 cases and a suspended sentence of imprisonment in one case. The remaining cases were dealt with by way of either a referral order (six cases) or compensation (four cases). In 31 cases against individual victims, the offence resulted in either a community or custodial sentence being imposed, suggesting that the courts often view this type of offending as sufficiently serious to cross either the community sentence or custody thresholds.

Nevertheless, a consideration of some of the most prominent offence factors shows that the individual-victim offences more commonly include aggravating factors than the offences committed against companies. The stolen property was known to have been recovered in 80.1 percent of the cases against companies, compared with only 28.3 percent of those against individuals. The value of the goods stolen in offences committed against individual victims was often greater than the values involved in most shopliftings, thereby affecting the seriousness of the offence through the harm caused. 78 percent of offences against companies involved property valued less than £100 compared with 34.8 percent of offences against individuals. Thefts against individuals were more likely to involve greater sums, between £100 and £500 (52.2%), and a smaller proportion (13.0 percent) involved values from £500 to £17,500.

**Table 6.7 Sentence Type and Nature of Victim**

			Nature of Victim		Total
			Individual	Business	
Sentence Type	Immediate custody	N	15	63	78
		%	19.2%	80.8%	100.0%
	Suspended sentence	N	1	2	3
		%	33.3%	66.7%	100.0%
	Detention Training Order	N	0	4	4
		%	.0%	100.0%	100.0%
	CRO	N	6	33	39
		%	15.4%	84.6%	100.0%
	CPO	N	1	3	4
		%	25.0%	75.0%	100.0%
	CPRO	N	4	3	7
		%	57.1%	42.9%	100.0%
	DTTO	N	0	35	35
		%	.0%	100.0%	100.0%
	Curfew	N	0	5	5
		%	.0%	100.0%	100.0%
	Attendance Centre	N	1	0	1
		%	100.0%	.0%	100.0%
	Supervision Order	N	3	12	15
		%	20.0%	80.0%	100.0%
	Fine	N	1	30	31
		%	3.2%	96.8%	100.0%
	Discharge	N	4	37	41
		%	9.8%	90.2%	100.0%
	Referral Order	N	6	14	20
		%	30.0%	70.0%	100.0%
	Reparation Order	N	0	2	2
		%	.0%	100.0%	100.0%
	CRASBO	N	0	1	1
		%	.0%	100.0%	100.0%
	Costs	N	0	1	1
		%	.0%	100.0%	100.0%
	Compensation	N	4	1	5
		%	80.0%	20.0%	100.0%
Total		N	46	246	292
		%	15.8%	84.2%	100.0%

Chi-Square = 3.910 Df = 4 P = 0.000

Occasionally the offences against individuals involved significant property damage being caused, particularly where the offender had broken a window during the course of stealing from a vehicle (as occurred in eight cases). Damage to property was known to have been caused in 21.7 percent of offences against individuals, compared with 6.9 percent of cases involving corporate victims. Group offending was slightly more prominent against individual victims (19.6 percent) than companies (13.8 percent).

#### 6.2.2 Individual Victims: Victim gender

The issue here is whether the victims' gender appears to affect the sentence outcome. Obviously, comparisons can only be drawn between cases involving individual victims. There was no apparent statistical significance between the victims' gender and sentence.



**Table 6.8 Sentence Type and Victim Gender**

		Victim Gender				Total
		Not applicable	Male	Female	Unknown	
Sentence Type	Immediate custody	N 63	8	7	0	78
	%	80.8%	10.3%	9.0%	.0%	100.0%
	Suspended sentence	N 2	0	1	0	3
	%	66.7%	.0%	33.3%	.0%	100.0%
	Detention Training Order	N 4	0	0	0	4
	%	100.0%	.0%	.0%	.0%	100.0%
	CRO	N 33	2	4	0	39
	%	84.6%	5.1%	10.3%	.0%	100.0%
	CPO	N 3	0	1	0	4
	%	75.0%	.0%	25.0%	.0%	100.0%
	CPRO	N 3	2	1	1	7
	%	42.9%	28.6%	14.3%	14.3%	100.0%
	DTTO	N 35	0	0	0	35
	%	100.0%	.0%	.0%	.0%	100.0%
	Curfew	N 5	0	0	0	5
	%	100.0%	.0%	.0%	.0%	100.0%
	Attendance Centre	N 0	1	0	0	1
	%	.0%	100.0%	.0%	.0%	100.0%
	Supervision Order	N 12	2	1	0	15
	%	80.0%	13.3%	6.7%	.0%	100.0%
	Fine	N 30	0	1	0	31
	%	96.8%	.0%	3.2%	.0%	100.0%
	Discharge	N 37	3	0	1	41
	%	90.2%	7.3%	.0%	2.4%	100.0%
	Referral Order	N 14	2	4	0	20
	%	70.0%	10.0%	20.0%	.0%	100.0%
	Reparation Order	N 2	0	0	0	2
	%	100.0%	.0%	.0%	.0%	100.0%
	CRASBO	N 1	0	0	0	1
	%	100.0%	.0%	.0%	.0%	100.0%
	Costs	N 1	0	0	0	1
	%	100.0%	.0%	.0%	.0%	100.0%
	Compensation	N 1	2	2	0	5
	%	20.0%	40.0%	40.0%	.0%	100.0%
Total		N 246	22	22	2	292
		%	84.2%	7.5%	7.5%	100.0%

Chi-Square = 84.883 Df = 48 P = 0.001

### 6.2.3 Individual Victims: Victim Age

Where the offender targets a vulnerable victim, proportionalists would claim that his culpability is increased, enhancing the seriousness of the offence thereby justifying greater punishment. A victim may be particularly vulnerable by reason of disability or age. Young or elderly victims may be less able to defend themselves or their property against others. To determine the impact of victim vulnerability on sentencing, discussion here focuses on those age groups most likely to be vulnerable, namely the elderly and the young. Six cases involved victims aged under 18 and four victims were over the age of 60.

Of the four cases committed against victims aged over 60, two (006 and 013) involved stealing items belonging to relatives. Were the court to consider vulnerability in these cases, it may have concluded that the victims were vulnerable due to the relationship shared with the offender which may provide an ease of offending, rather than on the basis of age.<sup>15</sup> In case 006, the offender had stolen electronics valued £350 from his mother's house. The court imposed a 12-month CRO to run concurrently to a similar order recently imposed for assaulting a police officer. In case 013, the 16-year-old offender stole her grandmother's credit card and used it to withdraw £300 from the victim's bank account. The offender had one previous conviction, thereby preventing the court from imposing a referral order. The offender was placed under supervision for 18 months. The other two cases committed against victims over the age of 60 (cases 091 and 093) concerned two co-offenders sentenced for stealing a vehicle belonging to a 67 year old male. The offenders had not previously come into contact with the victim and would not have known of the victim's age. Consequently, the offence did not concern a specific targeting of a vulnerable victim.

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<sup>15</sup> Cases involving a relationship between the parties are dealt with further in section 6.2.5.

Where the victim was under the age of 18, four cases were committed by a young offender, against whom the victim may not have been considered to be particularly vulnerable since the parties were of a similar age. Elsewhere case 175 was an opportunistic theft of a bicycle belonging to a 16 year old victim. The 28 year old offender did not appear to know of the victim's age at the time of the offence, and so had not specifically targeted the victim on the basis of his age and perceived vulnerability. The court imposed a 12-month conditional discharge. Case 290 is the only case involving a suggestion that the young victim may have been specifically targeted on the basis of his vulnerability. The 18-year-old offender had enticed the 16-year-old victim into some parkland, asked to borrow the victim's mobile telephone and then refused to return it, making threats toward the victim that he was carrying a knife (thereby making the offence akin to robbery). The offender was sentenced to serve three months' imprisonment concurrent to term imposed in case 290. The victim's vulnerable age may have been considered by the court as a source of aggravation, but the custody threshold may already have been passed due to the value of the goods, the totality of the offending, and the offender's not guilty plea.

#### 6.2.4 Individual Victims: Victim Ethnicity

The victims' ethnicity was known in 40 of the 46 cases involving offending against an individual. 35 of the victims were White European (87.5 percent) and five were Asian (12.5 percent). The incidence of imprisonment in those cases committed against Asian victims was particularly high, with four of the five cases (80 percent) resulting in immediate imprisonment. These four cases comprised of two pairs of offences. Cases 180 and 181 involved an offender who stole car stereos valued £470 from two vehicles, causing significant damage in the process. The offender was sentenced to serve two concurrent three

month terms of imprisonment. There was no evidence to suggest that the offender had specifically targeted the victims due to their ethnicity, nor that he was aware of the car owners' ethnicity at the time of committing the offences. The victims' ethnicity was unlikely to have influenced the sentence outcome, no doubt the court being of the opinion that the seriousness of the offences justified an immediate term of imprisonment.

Cases 290 and 291 involved an Asian offender convicted for two counts of thefts of mobile telephones, both belonging to Asian male victims. The offences themselves were relatively serious, involving goods worth £400, threats of violence being made to one of the victims, and multiple offending. The offender had also entered pleas of not guilty for both counts which would deprive him of a sentence discount. As with cases 180 and 181 above, the victims' ethnicity was unlikely to be cause to impose a custodial term, particularly since the offender in cases 290 and 291 was also Asian, thereby countering any suggestion of racial aggravation. The offences themselves may have warranted a punitive sentence, but it was the offender's recent release on prison licence that was most likely to lead the Crown Court to impose a custodial term here. In the final case involving an Asian victim, case 128, the offender had snatched the victim's purse as she walked along the street. The offender pleaded guilty to theft, although this may have been a plea bargain against a charge of robbery, which may have more suitably reflected the offence. The offender was ordered to undertake a 40 hour CPO. As with the other cases above, the seriousness of the offence itself justifies the imposition of a community sentence without concern that the victim's ethnicity may have been a determining factor.

### 6.2.5 Relationship between the offender and the victim?

A domestic or familial relationship may give rise to a breach of trust. A breach of trust may also arise where the offender steals from his or her employer. The statistics set out in Table 6.9 show the cross tabulation between sentence and the relationship between the parties. Of the 46 cases where the victim was an individual, there was some form of relationship between the offender and victim in 15 cases. In the other 31 cases involving individual victims, the parties were strangers and no such relationship existed.

Table 6.9 shows that where the offender and victim shared a relationship, a community-based sentence was the most likely outcome, being imposed in eight of the 15 cases. In three cases, a term of immediate imprisonment was imposed. None resulted in a fine or discharge, suggesting that those offences involving an interrelationship between the parties were considered by the courts to be sufficiently serious to place within the higher sentencing options.

However, the number of offences committed against a member of the offender's family or a friend or neighbour is so small that it is inappropriate to suggest even tentative conclusions as to the impact this relationship may have on the sentence.

**Table 6.9 Sentence Type and Victim/Offender Relationship**

			Victim Relationship With Offender					Total
			Not Applicable	None	Family	Friend/ neighbour	Working relationship	
Sentence Type	Immediate custody	N	63	12	0	2	1	78
		%	80.8%	15.4%	.0%	2.6%	1.3%	100.0%
	Suspended sentence	N	2	1	0	0	0	3
		%	66.7%	33.3%	.0%	.0%	.0%	100.0%
	Detention Training Order	N	4	0	0	0	0	4
		%	100.0%	.0%	.0%	.0%	.0%	100.0%
	CRO	N	33	3	2	1	0	39
		%	84.6%	7.7%	5.1%	2.6%	.0%	100.0%
	CPO	N	3	1	0	0	0	4
		%	75.0%	25.0%	.0%	.0%	.0%	100.0%
	CPRO	N	3	3	1	0	0	7
		%	42.9%	42.9%	14.3%	.0%	.0%	100.0%
	DTTO	N	35	0	0	0	0	35
		%	100.0%	.0%	.0%	.0%	.0%	100.0%
	Curfew	N	5	0	0	0	0	5
		%	100.0%	.0%	.0%	.0%	.0%	100.0%
	Attendance Centre	N	0	0	0	0	1	1
		%	.0%	.0%	.0%	.0%	100.0%	100.0%
	Supervision Order	N	12	1	1	0	1	15
		%	80.0%	6.7%	6.7%	.0%	6.7%	100.0%
	Fine	N	30	1	0	0	0	31
		%	96.8%	3.2%	.0%	.0%	.0%	100.0%
	Discharge	N	37	4	0	0	0	41
		%	90.2%	9.8%	.0%	.0%	.0%	100.0%
	Referral Order	N	14	2	1	0	3	20
		%	70.0%	10.0%	5.0%	.0%	15.0%	100.0%
	Reparation Order	N	2	0	0	0	0	2
		%	100.0%	.0%	.0%	.0%	.0%	100.0%
	CRASBO	N	1	0	0	0	0	1
		%	100.0%	.0%	.0%	.0%	.0%	100.0%
	Costs	N	1	0	0	0	0	1
		%	100.0%	.0%	.0%	.0%	.0%	100.0%
	Compensation	N	1	3	0	0	1	5
		%	20.0%	60.0%	.0%	.0%	20.0%	100.0%
Total		N	246	31	5	3	7	292
		%	84.2%	10.6%	1.7%	1.0%	2.4%	100.0%

Chi-Square = 123.052 Df = 64 P = 0.000

It is, however, worth noting that three cases involved the theft of property belonging to the offender's parent or grandparent, all of which resulted in a sentence based in the community. Two of these (cases 013 and 170) were thefts committed by young offenders, for whom the courts have somewhat restricted sentencing options. Even if the existence of a relationship between the parties does not have a bearing on the *type* of sentence imposed, it might affect the *quantum* of the penalty. In case 013, the 16 year old offender was made subject to an 18 month supervision order having used a stolen credit card belonging to her grandmother to withdraw £300 from an automatic teller machine. She had only one previous conviction, a similar theft from a dwelling some six months earlier, for which she was handed a six month supervision order. The length of the order in the immediate case is among the longest of its type seen within this study's sample.<sup>16</sup>

Although the existence of a relationship between the parties might be treated by the courts as a source of aggravation, it is not usually sufficiently aggravating to require a custodial sentence. As mentioned above, only three cases including a relationship led to a term of immediate imprisonment, all three of which contained other factors that may have contributed to the decision to imprison. A breach of trust was common in all three cases. The offender in case 171 had worked as a waitress and was charged with stealing items, including bank cards, from a patron's handbag. The victim had realised that her bag had been moved and that certain items were missing. The offender, who had 23 previous convictions including nine for theft, was convicted after a contested trial and was sentenced to two months' imprisonment. This decision to imprison may well have been based on a number of factors: the nature of the property, the offender's not guilty plea, her list of recent convictions (for which she had received a number of fines and community based penalties, the ineffectiveness of which may have led the magistrates to conclude that custody was now

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<sup>16</sup> Cases 078 and 079 were also met with 18 month supervision orders, and the length of the order in 224 was unknown.

the only reasonable option), and the (albeit ephemeral) professional relationship between the parties. Secondly, case 196 concerned the theft of electronics from the victim's house whilst the offender was staying there as a guest. The offender had been recently released on licence, and was returned to custody for four weeks under the terms of his licence. The fact that the offender had breached his early release conditions was presumably the main determinant in recalling him to the young offenders' institution, effectively resulting in a custodial sentence for this offence. The third and final case involving an intra-party relationship that resulted in custody was case 290 where the offender enticed a neighbour into an area of parkland and asked to borrow the victim's mobile telephone. Once the victim had agreed, the offender refused to return the property, making threats to the victim intimating that he was carrying a knife. The case resulted in a three month custodial term, although the offender was also sentenced for a second count of theft.<sup>17</sup> Separate penalties were not given, meaning that the term of imprisonment was measured against the totality of the offending. As with case 171 above, the decision to imprison may have been affected by a number of contributing factors, only one of which was the relationship between the victim and offender. It thereby appears that the fact that the parties shared a relationship of one form or another was not in itself reason for the courts to impose a custodial sentence, although it might have contributed towards that decision when other aggravating factors are also present.

One case in which the relationship between the parties might have impacted on the sentencing decision is case 014, although of greater significance may have been the position entrusted upon the offender, rather than the relationship between the parties per se. There was no evidence that the offender and victim knew each other, only that they worked for the same company. The offender, a 16 year old white male, was employed as a part-time cleaner

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<sup>17</sup> Case 291, which also was a charge of theft of a mobile telephone.



of an office, wherefrom he stole £3 from an employee's desk drawer. The seriousness of the offence may have been aggravated by the trust placed in the offender to undertake his work without supervision, and the fact that the offender appeared to have no justifiable reason for opening the desk drawer. He had one previous conviction for criminal damage three months earlier, for which he received a four month referral order; thus, at the time of the offence the order still had one month left to run. Following his guilty plea for the current offence, the offender was handed a 15 hour attendance centre order and was ordered to pay £3 compensation to the victim . Where an attendance centre order is imposed on an offender over the age of 14 (as in this case), the minimum duration was 12 hours<sup>18</sup> and, more importantly, a period of over 12 hours could not be imposed unless the court was of the opinion that 12 hours would be inadequate, in which case a term of up to 36 hours can be imposed where the offender is aged 16-20.<sup>19</sup> When applied to this case the implication becomes clear: for the youth court to impose a 15 hour order on the offender, it must have been of the opinion that a standard 12 hour period would be inadequate for the offence. This case appeared to include three sources of aggravation: the relationship between the parties as a possible breach of the position entrusted upon the offender, the fact that the offender opened the employee's desk drawer without having justifiable reason for doing so, and the operation of a previous court order at the time of the offence, although this had expired by the time of the court hearing.

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<sup>18</sup> Section 60(3) PCCSA 2000

<sup>19</sup> Section 60(4) PCCSA 2000

### 6.3 Conclusions

The present chapter has considered a variety of offender and victim characteristics to ascertain the extent to which the presence of these appear to impact on the courts' sentencing decision.

Although the analysis showed no statistical significance between previous sentences and the sentence for the latest theft conviction, it was interesting to find instances where offenders were given more than one discharge and more than one rehabilitative sentence following further offending.

Most offences included in the sample were committed against companies. Although individual victims might be expected to suffer more harm than their corporate counterparts, there was no apparent evidence that offences against individual victims resulted in tougher sentences. Although the existence of a relationship between the parties might be treated by the courts as a source of aggravation, it is not usually sufficiently aggravating to require a custodial sentence, despite the fact that such offences will often involve an element of breach of trust.

Overall, the offender's physical characteristics (gender, age, and ethnicity) appear to have little impact on the sentencing decision. In line with youth justice policy, which aims to safeguard the welfare of children, young offenders were unlikely to receive custodial sentences. Specialist youth disposal options, referral orders and supervision orders, were the most likely sentence outcomes in cases concerning young offenders. Elsewhere, age appears to have no impact on the sentencing decision.

It is difficult to draw any meaningful conclusions on the apparent effect of previous convictions on sentencing. Whilst it appeared that more punitive penalties were dealt to some offenders on the basis of prior convictions, others escaped severe penalties despite their lengthy records. In a significant proportion of cases, the offender's previous convictions seemed to have no significant relationship with sentence, which may be expected if courts are utilising the principle of progressive loss of mitigation, which affords only a limited role to prior offences in determining sentence.

The offenders' gender and ethnicity had no effect on sentence, although offences committed against Asian victims were more frequently dealt with by way of custodial sentences. These offences were more likely to involve aggravating factors such as high value goods and multiple offending. The sample included an insufficient number of cases to determine the effect that victim vulnerability (on the basis of age) has on the sentencing decision. The targeting of vulnerable victims would be expected to have some impact on the sentence under a proportionality-based system, affecting as it does the seriousness of the offence on the basis of the offender's culpability.

## **CHAPTER SEVEN**

### **INTERVIEWS WITH SENTENCERS AND PROBATION OFFICERS**

#### **7.1 Introduction**

The interviews undertaken for this study were conducted between October 2008 and September 2009, and comprised of interviews with sentencers (magistrates and Crown Court judges), and probation officers, the latter were included because of their role in writing pre-sentence reports. The interviews were semi-structured in nature.

#### **7.2 Interviews with Sentencers**

Interviews with magistrates and judges took place between October 2008 and February 2009 and were conducted in the respective court buildings. In total, two Crown Court Judges and eight magistrates, including one District Judge (Magistrates' Court), were interviewed.<sup>1</sup>

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<sup>1</sup> For information surrounding the interview format, see section 4.6

### 7.2.1 Purposes of sentencing

All interviews with sentencers began with the same opening question concerning the purposes of sentencing in theft cases. Most responded to say that the purpose(s) most appropriate in a particular case vary depending on the circumstances of the offence and the offender's characteristics; the purpose(s) to be employed in each case are chosen by the bench on this basis. The approach employed for determining the purposes of sentencing was best summed up by the sole District Judge (Magistrates' Court):

M4: [the purpose of sentencing differs] depending on the offender, on the offender's circumstances and of course the nature of the offence of theft... It also depends on the nature of the offender, whether it is a young or older person, previous convictions for an offender who has a whole host of convictions for offences of a similar nature.

The same magistrate did however note that, generally, the purpose of sentencing is to punish rather than to rehabilitate:

M4: The purpose of sentencing is generally punishment rather than rehabilitation, not always but sometimes it is inevitable that there has to be punishment.

Both Magistrates Two and Three, who were interviewed jointly for logistical reasons,<sup>2</sup> claimed that punishment and rehabilitation were the two purposes of sentencing for which they have regard, particularly in theft cases, with rehabilitation playing a particularly important role in cases where the offending is caused by an underlying drug addiction. A similar approach was taken by Magistrate Six:

M6: For me, it is about rehabilitating the offender; finding out why he has done it. Ninety percent of the thefts you get are either drug or alcohol related. So it is dealing with those first and then the punishment element as well.<sup>3</sup>

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<sup>2</sup> Interviews with magistrates took place during the recess period between the morning and afternoon court sessions. On this occasion, the morning session had overran, leaving insufficient time to interview both magistrates individually. They could only be accommodated by conducting a joint interview.

<sup>3</sup> In this study's sample, only 58 cases (19.9%) were known to have been committed to fund a drug or alcohol dependency.

Magistrates Two, Three, Four and Six therefore demonstrate a bifurcated approach to sentencing for theft. Where the offence occurs due to a criminogenic need (such as a drug or alcohol dependency) the court will seek to rehabilitate the offender. In other cases, the purpose of sentencing is simply punishment.

The approach of Magistrate Seven appeared to view the purposes differently depending on the offender's prior offending history. According to Magistrate Seven, the primary purposes of sentencing are deterrence and punishment. But where the offender has a record of previous criminality, it may become necessary for the court to invoke a rehabilitative approach to sentencing.

Magistrates One, Five and Eight, who had not shown an attraction to a particular purpose, were asked specifically about the five sentencing aims laid out in s.142(1) of the Criminal Justice Act 2003. All respondents claimed to use their own judgement as to which purpose to apply in any given case, there being no specific guidance to follow in relation to this. This raises concerns of inconsistent approaches at sentencing. Where some magistrates may impose a punitive rehabilitative or deterrent sentence, others may favour a less punitive punishment which is proportionate to the seriousness of the offence and does not principally aim to break the offending behaviour.

All that being said, Magistrate Eight acknowledged that the decision regarding which sentencing aim to apply in any particular case is not an entirely free choice for the sentencing bench, who may have to work within confines set by the previous bench (where applicable). Where a case has been adjourned before sentencing, the previous bench will have completed a sentencing reasons form. This form includes the sentencing purposes

being considered by the bench, along with a prescribed sentence range. If a pre-sentence report is required, the sentencing reasons form is forwarded to the Probation Service to enable the drafting of a pre-sentence report. The sentencing purposes prescribed by the trial bench are likely to shape the recommended sentence contained within the report, it being considered by Probation to be a parameter for them to work within.<sup>4</sup> The ultimate sentencing purpose applied will have been informed by the pre-sentence report and also the sentencing reasons form:

M8: ...so you take into consideration the sentencing reasons from the other bench, the previous bench, and you also take into consideration what Probation is saying [in the pre-sentence report].

Where offending is known to be caused by an underlying drug or alcohol dependency, the courts show more consistency in the sentencing purposes employed. All magistrates and judges had identified rehabilitation as the primary purpose of sentencing persistent offenders whose criminality is due to a drug or alcohol addiction. In such instances, the courts will carefully consider the merits (and likely success) of a drug rehabilitation requirement.<sup>5</sup>

Overall, when considering which sentencing purpose to apply the courts appear not to take too formulaic an approach preferring instead to use their own judgement when deciding which aim to follow, this decision being made on a case by case basis by taking into consideration the nature of the offence and the offender's character. Where sentencers follow their own sentencing purposes agenda, there is always the risk of inconsistencies between individuals, even where it appears that their practices are similar. However, where the

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<sup>4</sup> See discussion of sentencing purposes within probation officer interviews at section 7.3.4

<sup>5</sup> The drug rehabilitation requirement has effectively replaced the drug treatment and testing order under the 1991 Criminal Justice Act framework.

offending behaviour is due to a drug or alcohol dependency, the sentencers demonstrate a more consistent approach, favouring rehabilitative sentencing.

The judges and those magistrates who had experience of working on the Youth Bench were also asked about the purposes of sentencing young offenders.<sup>6</sup> Both Crown Court Judges were of the opinion that custody should be avoided as far as is possible in cases involving young offenders, although a similar point had also been raised in relation to adult offenders:

J2: ...if it is a youth then the Children and Young Persons Act [1933] applies in the sense that the court must act to do what is right to achieve the welfare of the child.

Crown Court Judge One, was in agreement with Judge Two on the above point, but further noted that different principles would apply in cases with “persistent young offenders”,<sup>7</sup> where it seems the court will endeavour to deter the offender and protect the public from further offending behaviour. Consequently, the welfare of the young offender is relegated from its position as the primary sentencing purpose. When the young offender is labelled as being “persistent”, the court’s approach changes from being based principally on the Children and Young Persons Act 1933, to one in which crime reduction takes a central role:

J1: [In cases of young offenders, the court must] effectively avoid custody... So rehabilitation and support I think is another way of putting it [the purposes of sentencing young offenders]... Personally I strive as hard as I can to avoid putting a youngster away. [But] there are persistent young offenders for whom, even for comparatively minor crimes, they are so repeated that you have got to make an example of them; you have got to give society a break from their behaviour.

Many of the magistrates were in agreement with the judges that young offenders should be offered support and, ultimately, the courts should aim to dissuade such offenders from

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<sup>6</sup> A young offender is any offender aged 10-17 years, see s.68 Criminal Justice Act 1991

<sup>7</sup> Although there is no statutory definition of a persistent young offender, the Sentencing Guidelines Council has suggested that the court should regard as a persistent young offender, a young person aged 10-17 years who has “been convicted of, or made subject to a pre-court disposal that involves an admission or finding of guilt in relation to imprisonable offences on at least three occasions in the past 12 months.” SGC (2009) at page 11.



reoffending. This might mean that the courts believe that young offenders should be spared the negative effects that custody might have upon them:

M4: With a young offender we try to find a way to...try to keep them out of the courts, try to...dissuade them from continuing to offend. Youth courts, of course, with referral orders and a whole raft of community orders that are available to us after that, are all designed to prevent them from getting into the mainstream punishment system.

### 7.2.2 Pre-sentence reports

Magistrates and judges were asked about the weight they attribute to the recommended sentence provided within a pre-sentence report,<sup>8</sup> an instrument drafted by the Probation Service under the request of the trial bench. The report includes information concerning the offence, the offender, previous criminality and his attitude to the offending, in addition to an assessment of the offender's risks of reoffending and reconviction. The report concludes with a recommendation as to how best to deal with the offender in the eyes of the report writer, which the court may take into account when sentencing, although there is no duty for the court to follow it.<sup>9</sup>

Almost all magistrates and both judges recognised that the pre-sentence reports worked as a valuable source of information, providing details surrounding the offender which might not otherwise be made known to the court. The consensus view was that this was due to the probation officer being afforded more time with the offender than is available in court to discuss his background in a less formal setting, during which time the offender is less likely

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<sup>8</sup> The term pre-sentence report is used as an umbrella term to include both Standard Delivery Report and Fast Delivery Report, the purposes of which are the same although a Standard Delivery Report provides more detail. A Fast Delivery Report is not considered appropriate in cases where the offender poses a risk to others or has complex needs such as a drug or alcohol dependency.

<sup>9</sup> Section 156 Criminal Justice Act 2003 requires the court to obtain *and consider* a pre-sentence report before imposing a community or custodial sentence, unless the court is of the opinion that a report would be unnecessary. Similar provisions existed under s.36 Powers of the Criminal Courts (Sentencing) Act 2000.

to be so taciturn. Certainly, none of the interviewees felt a compulsion toward following the recommendation as a matter of course, with a small number of magistrates insisting that the sentencing decision is ultimately one to be made by the magistrates in line with the appropriate guidelines, although the reports were considered to be useful instruments in enabling the bench to come to a decision. A number of magistrates also made reference to the experience and expertise of the probation officers, a fact that influences the court to pay greater attention to what is recommended in the report:

M7: I tend to apply quite a lot of weight to [the recommendations]. We turn to [the probation officers] as being the experts in this field. The officer is there in court and we make full use of them; they have a knowledge of all the details of the offence, the offender and previous convictions, his lifestyle, his family, everything about him. And that is important information we might not be able to get. We can ask for it. We can ask searching questions but...the Probation Service, on a one-to-one over a desk, will get more information from [the offender].

That being said, some magistrates seem to largely disregard the recommendation made, although greater attention is given to the background information set out in the report. One magistrate explained that the sentencing decision is ultimately one to be made by the court:<sup>10</sup>

M2: It might mention the [risk] of the offender to the public...The reports include graphs and so forth on that sort of thing, and we might go by some of those, but definitely not the recommendation: that is our decision as to sentence within the guidelines.

Conversely, one Crown Court Judge stated that the recommendation is often read first, and appeared to suggest that only if that recommendation is realistic would the remainder of the report be considered:

J1: I think that most of us read the recommendation first... If you can see that it is a sensible recommendation then you want to pay particular care to what is being said.

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<sup>10</sup> This view is consistent with a number of Scottish sentencers interviewed by Tata, *et al* (2008), at 845

The judges and longer-serving magistrates had also recognised a noticeable improvement in the quality of the reports over recent years, with more realistic recommendations now being made. Gelsthorpe and Raynor's study on the quality and effectiveness of Reports found a suggestion that reports perceived by the sentencers as 'higher quality' were more likely to result in the imposition of a community sentence rather than imprisonment.<sup>11</sup> No doubt the courts are more welcoming of the reports if the recommendations prescribed are perceived as being realistic:

J2: There has been, I think, an improvement over the quality of the recommendations over the last three or four years; they are more informed than they used to be and I think the current sentencing guidelines have helped because they are available to [the probation officers]. And I think that the shift in the culture within the probation service has likewise assisted. So it is now closer to the American approach to probation than it is the social work approach to probation. Sometimes some reports, in my experience, get information out of the defendant that there is no way an advocate could get from the client. I find them more often to be helpful than not helpful.

That being said, three magistrates and one Crown Court judge indicated that the reports still rarely suggest the imposition of a custodial sentence, continuing with a heavy reliance on community-based sentences. This may not be surprising when one remembers that the reports are written by probation officers who would work with the offender in a supervisory role under a community sentence.

M1: I might say it is fairly rare for the Probation Service to suggest a custodial sentence, although it does happen occasionally, not very often...and so we might not go along with the route they suggest.

Although the majority of interviewees were complimentary of the pre-sentence report, most were quick not to overstate its usefulness as a sentencing tool. Claims were made that the reports were unnecessarily long,<sup>12</sup> that custody was very rarely recommended<sup>13</sup> and that ultimately the sentencing decision is one to be made by the sentencing bench whilst having

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<sup>11</sup> Gelsthorpe & Raynor (1995), at 197. See also Creamer (2000), page 8

<sup>12</sup> Per Judge One

<sup>13</sup> Per Magistrates One and Two

regard to guidelines, the comments made by the previous bench, and the pre-sentence report. The report is only one instrument to be taken into consideration when passing sentence:

M8: Quite often [the pre-sentence report] does give a basis [for sentencing], but it all depends on the sentencing bench... The pre-sentence report is a guideline, so you look at all the mitigating and aggravating features, you listen to the facts of the case. It is up to the sentencing bench to put everything into the equation and to come up with the right answer.

### 7.2.3 Mode of Trial

As an either-way offence, theft may be tried and sentenced in either the magistrates' court or the Crown Court, with the latter enjoying greater sentencing powers. Theft is not commonly committed to the Crown Court for sentencing, although Magistrate One highlighted that there may be occasions where the aggravating factors call for a sentence outside of the magistrates' powers. It appears as though a theft case would only be committed to the Crown Court if the offence had involved a cocktail of significant aggravation. It does not appear that a single aggravating feature would in itself be sufficient to justify committing the case to the Crown Court:

M1: [In cases of breach of trust,] if it is a very high value, and I mean into the thousands [of pounds], then we almost certainly think that our powers of punishment...would not be sufficient and we would probably send it up to the Crown Court for a greater sentence than we can impose.

*Prima facie*, it could be claimed that, if the powers of the magistrates to refer a trial to the Crown Court or to commit the case for sentence are used appropriately, the Crown Court should rarely impose a sentence within the lower courts' powers. However, where a defendant elects trial by jury within the higher court, the sentence imposed upon conviction

could be expected to still fall within the lower courts' powers as offence seriousness is not acting as a reason for the case moving up to the Crown Court:

- J2: There are two types of circumstance [where cases are arguably committed to the Crown Court wrongly]. One is that defendants still have the right to elect on section one theft. I had one where a man had stolen two chocolate bars and he elected to trial. The other situation, which to be fair in theft cases one sees rarely, where the magistrates have committed it for sentence and the judge takes a different view to that on the magistrates. That is not to say that they got it wrong: you may have more information than the justices had. Sometimes they may get it wrong... Those are the two circumstances where we see theft, I think.

The Judges were of the opinion that cases sent to the Crown Court are rightly committed, even where the sentence ultimately imposed is within the magistrates' powers. There appears to be no criticism by the Judges when the magistrates commit to the higher court, what is later deemed by the Crown Court to be, a relatively minor offence.

#### 7.2.4 Use of custodial sentencing

Sentencers were asked whether theft would ever cross the custody threshold, and if so, under what circumstances. Respondents unanimously agreed that theft may, in some cases, warrant a custodial sentence. Theft in breach of trust was the most commonly cited factor which might attract a period of imprisonment, although this is only likely to be true where the breach of trust is in company with other aggravation (such as high value goods stolen).<sup>14</sup>

- M8: Certainly theft in breach of trust [will almost inevitably cross the custody threshold]. If you have not crossed the threshold, you are certainly close to crossing the threshold.

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<sup>14</sup> Such a practice would reflect guidance emanating from both the Court of Appeal (*Barrick* (1985) 7 Cr App R (S) 142; *Clark* [1998] 2 Cr App R (S) 95) and Sentencing Guidelines Council (SGC (2008)), with the latter stating that the seriousness of the offence increases in line with the level of trust breached, and the value of the theft also determines the seriousness of the offence. For thefts of less than £2,000 the starting point is a non-custodial sentence (at pages 10-11).

However, the consensus view was that custody is not axiomatic in breach of trust cases. The court will take into account all relevant factors and may decide that the mitigation is sufficiently strong to bring the offence to rest below the custody threshold:

M1: [For] theft in breach of trust, the custody threshold would be the starting point... You could bring it down [below the custody threshold]... It may be that it is a low value theft. It may be that it has been done on impulse, rather than planned. It may be a single item. So all of those things would mitigate the offence and it might bring it down, in the magistrates view, from a custodial sentence down into a lower bracket.

Offender characteristics may also be associated with crossing the custody threshold. Two magistrates also highlighted repeat offending as potentially crossing the custody threshold.<sup>15</sup> Rather than custody being warranted on the basis of offence seriousness, the decision to imprison is based on the offenders' prior criminality and, moreover, his failure to comply with previous court orders. In this sense the courts appear to use custody as a last resort where all other options have been tried but proved ineffective against the offender:

M7: If someone is a persistent offender for shoplifting, the time comes where enough is enough. They have probably had probation orders in the past and, for whatever reason, they have probably breached them but we have got to protect the public and deal with them by way of custodial sentences.

Imposing custody for a first theft offence appears to occur only under exceptional circumstances:

M3: As a general rule we would never send someone into custody unless everything else has been tried. It is very rare that someone commits a first offence and you send them into custody. You normally try a lot of other ways before. So if it is that they have got to go to prison then I think prison they should go because normally everything else has been tried.

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<sup>15</sup> The role of previous convictions and previous sentences are considered further in sections 7.2.8 and 7.2.9 respectively.

The District Judge (Magistrates' Court) appeared to suggest that custody may be imposed in cases where there is a series of aggravating factors and a distinct lack of mitigation, indicating that the use of custody is restricted to the more serious forms of offending. It is interesting to note that the District Judge made no reference to the offender's characteristics giving rise to the need to imprison. Rather, the approach taken by the District Judge seems to be that custody is justified only where the offence is sufficiently serious:

M4: ...of course it is our own judgement that determines whether or not in that particular case [the custody threshold has been passed]. So you look at the circumstances of the case, and there is no hard and fast rule. It is just an accumulation of aggravating factors and perhaps a lack of mitigating factors to reduce the level below the custody threshold.

## 7.2.5 Non-custodial sentencing

### 7.2.5.1 Community-based penalties

Community penalties encompass a wide range of sentencing options, not all of which are available to the courts in all circumstances. Some community sentences may only be imposed against certain age groups, or where the offender has a recognised, particular need: a drug rehabilitation requirement can only be imposed if the offender is dependant on, or has a propensity to misuse, drugs and where that dependency is susceptible to treatment.<sup>16</sup> The interviewed magistrates explained that the community band of disposals constitutes an important range of options which the court will use in a significant proportion of theft cases:

M7: Yes, quite a high proportion of [theft] cases would attract a community sentence. If it is a persistent offender and the reason they are offending is- we try to deal with it and sort it out. Yes [the community band is where the bulk of theft offences would lie. In most cases] we would be looking at community sentences.

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<sup>16</sup> S. 209(2)(a) Criminal Justice Act 2003. Similar provisions existed under the Powers of the Criminal Courts (Sentencing) Act 2000 in relation to drug treatment and testing orders.

The decision to impose a community-based sentence may be based on the offender's previous convictions, or where the immediate offence is sufficiently serious to warrant such a penalty in accordance with s. 148(1) of the Criminal Justice Act 2003:<sup>17</sup>

M4: A community penalty would be considered after the first few offences, depending on the nature and gravity of those offences. It may be a community order is imposed for a first offence because it is particularly serious.

Some community sentences, such as drug treatment and testing orders,<sup>18</sup> are imposed to address the cause of the criminality, but they are only justified where they have a chance of success.<sup>19</sup> The court appears to take the pragmatic view that it is undesirable to impose a drug rehabilitation requirement on an offender who shows no signs of wanting to accept treatment for his addiction. To do otherwise would be 'setting the offender up to fail' and, quite probably, he would breach the order shortly after, whereupon the court would have to deal with him again:

M1: If it is a drug-related [offence]...which seems to be the most prevalent, then we would look very seriously at getting him onto a drug course, the drug rehabilitation programme in conjunction with the Community Drugs Team. And if we felt that he could be helped in that way, then we would certainly try to impose that and we do feel that we have duty to try to reform these people, particularly in cases like shoplifting, because if they are only doing it to support their drug habit, if we don't have the drug habit we will not have the shoplifting.

That being said, even in cases where the court is aware of an underlying drug (or alcohol) problem, one interviewee suggested that it would be rare for an offender to receive a community-based sentence for a first offence:

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<sup>17</sup> A similar provision existed under s. 6(1) of the Criminal Justice Act 1991, which applied in the cases within this study's sample.

<sup>18</sup> And its successor, the drug rehabilitation requirement.

<sup>19</sup> In accordance with s.209(2)(a)(ii) CJA 2003: the court may only impose a drug rehabilitation requirement if it is satisfied that the offender's dependency is susceptible to treatment. Prior to the enactment of the 2003 Act, an identically worded provision existed under s.52(3)(b) Powers of the Criminal Courts (Sentencing) Act 2000.



M4: Certainly one would look at it very carefully as soon as one became aware of a drug problem. One may even consider imposing a community order with a drug rehabilitation requirement if it were recommended by the Probation Service for a first offence; it is unusual for a first offence, I have to say, but it depends on the seriousness of that offence and the history of the addiction which has been established by the Probation Service.

The above comment seems to claim that, where the offence is not particularly serious, a non-community (and non-custodial) sentence would be imposed for a first-time offender, even where a drug or alcohol dependency was the cause (or probable cause) of his offending and may be susceptible to treatment. If the courts aim to reduce the offender's propensity to offend, it seems sensible to impose an order aimed at treating the criminogenic addiction at an early stage, when it may be more susceptible to treatment.

That being said, for a first offence, the courts may prefer to impose a conditional discharge (as a cheaper disposal option and one that is less burdensome on the offender), which may be sufficient to dissuade the offender from further offending behaviour committed to fund a drug or alcohol addiction. But where the drug addiction is well established and offending has only recently begun in a need to fund the dependency, the offender may require a more pro-active and supportive disposal than a conditional discharge. Furthermore, if the court is not considering imposing a community sentence on a first-time offender with a drug dependency, the law does not require it request a pre-sentence report.<sup>20</sup> Consequently, the full extent of the offender's addiction may not be uncovered by the court.

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<sup>20</sup> Section 156(3) Criminal Justice Act 2003, which succeeded section 36(4) Powers of the Criminal Courts (Sentencing) Act 2000.

### 7.2.5.2 Fines and discharges

Although fines are a relatively commonly invoked penalty,<sup>21</sup> they are perhaps unlikely to be used in more serious cases lying as they do toward the lower end of the sentencing hierarchy. Most interviewees were of the opinion that fines were most likely to be used where the offender does not have a string of previous convictions to his name, or where there is an apparent recent break in offending. When discussing custodial and community penalties, often interviewees discounted these for first time offenders, leading to the conclusion that most would receive a fine or discharge for a first offence. Fines, and indeed discharges, may also be imposed in so called “petty offences” involving little or no aggravation and perhaps some mitigation:

M4: The offender who is fairly new to the criminal justice system, does not have a substantial record- Or perhaps one might consider a financial penalty for someone who has not offended for some time; has a dreadful record but has kept out of trouble for some time. One might consider a conditional discharge or a fine in that situation. Or somebody who has been in prison and has- Let us say you are starting the whole system again but if it is a very petty offence you might consider a financial penalty for that.

The question arises as to whether the imposition of a fine relies on the offender being in a financial position to make payment. If so, the related question is how are those offenders who cannot pay a fine to be sentenced? Magistrates were asked for their views and practices on imposing fines upon offenders with limited financial means. For the most part, magistrates stated that an offender’s low income would not lead them to rule out imposing a fine if the offence warranted such a penalty.<sup>22</sup> However, the income *is* relevant to fixing the

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<sup>21</sup> Of this studies sample, 31 cases (10.6%) resulted in a fine being imposed as the primary sentence. According to Ministry of Justice statistics, a fine was imposed in 13.1% of theft cases sentenced in all courts in England and Wales in 2008: Ministry of Justice (2010b), Supplementary Tables volume 5.1.

<sup>22</sup> Although note the quote from Magistrate Seven, above: “If they are in a position to pay a fine, we have got to be fair, then we would look at fines.” This implies that the imposition of a fine relies on the offender being in a position to make payment.

level of the fine to be paid, the amount of the fine being determined in line with the offender's financial position:

M4: Well everybody has the means to pay it because everybody has an income of sorts, or is entitled to an income of sorts whether it is income from earnings or benefits. So one can impose a fine even if it is with a first payment date of so much per week which is set for six weeks ahead to enable that person to start to claim benefits or find work.

Ultimately, although the offender's means is relevant to the amount of fine imposed, it is not used as a determinant of whether a fine *can* be imposed.<sup>23</sup> If a financial penalty is deemed to be appropriate for the seriousness of the offence, the magistrates would impose a fine, irrespective of the offender's financial means. Consequently, the court would not consider imposing a more severe penalty type (notably a community sentence) where the offender is not financially stable:

M1: If we felt that the fine was the right bracket, the right banding, then we must be in the fine banding or below. If it is serious enough for a community penalty, it must be a community penalty. So you cannot say they cannot afford to pay the fine so we will give them a community penalty. That is not the way it works.

Although most magistrates were of the opinion that a fine could be imposed on an offender, regardless of income, this view was not supported by all: "If they are in a position to pay a fine, we have got to be fair, then we would look at fines."<sup>24</sup> This suggests that the opposite is true: where an offender is not in a position to pay the fine, this magistrate at least, would not consider a financial penalty further.

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<sup>23</sup> Although note the dissenting opinion of Magistrate Seven.

<sup>24</sup> Magistrate Seven

### 7.2.5.3 Custody in lieu of fine payment

In cases where the offender has little or no disposable income, the magistrates do have a method of circumventing the imposition of a fine. A small number of magistrates spoke about the practice of offering the offender a choice to either pay a small fine *or* spend one day in prison in lieu of the fine payment:

M1: It is a practice which is considered and it is usually with people who have basically no money at all, and if they have been arrested and their freedom has been denied them for a day, because they have spent the night in prison and then in the cells down in the court, then come up before the court. We might consider, where the fine is small, that they pay it immediately or they serve one day in prison, and we deem that to have been served by the period that they [have already] served in custody. And that is a way, if you like, of allowing the person to resume his life without a huge penalty hanging over him which we are probably convinced he will never get paid because he has not got any money to pay. If someone is on job seekers' allowance or some other sort [of income] from the State then we can do what is called an attachment of benefits... But on occasions where people come before us who already have two attachments to their benefits, and if they are only given £94 a fortnight, two attachments to their benefits will probably take five, eight, ten pounds out. You have got to leave them with something to live on, otherwise they will go out and shoplift again.

The practice of imposing a nominal custodial sentence in lieu of the payment of a fine appears to be limited to cases where (i) the magistrates deem a fine to be an appropriate sanction for the offence; (ii) the offender could not be expected to pay the fine due to his very limited financial means, and (iii) the offender had spent the previous night in custody. The practice may be used in cases where an offender is making payments for earlier fines and the imposition of an additional fine would be beyond what he could be expected to pay. Consequently, the court does not expect the offender to pay the fine; the sentence is passed with full expectation of the offender accepting the short custodial term since this has already been served and payment of the fine is not required. Ultimately, it is a custodial sentence rather than a financial penalty since the fine is not paid nor, perhaps more importantly, does the court *expect* it to be paid. The punishment imposed on the offender is the previous night spent in incarceration. Again, it should be reiterated that when adopting this practice, the court does not suppose that the offender will make payment for the fine:

M1: It may be something that magistrates use to sort of help them in some ways so that you are not burdening them with a financial penalty which they cannot afford to pay, and may lead to further crime. It is the business of not setting somebody up to fail; there is no point in that otherwise there are up before you again and you have got another problem to sort out.

#### 7.2.6 Offence specific aggravation and mitigation

Sentencers were asked how they address cases involving both aggravating and mitigating features. For the most part, the approach taken is based on experience. Most interviewees were not able to articulate precisely how various factors sit together, although some factors were clearly considered to be more serious than others.<sup>25</sup> When taking into consideration all of the present factors, there are no cast-iron rules to attach. The factors are dealt with intuitively:

M4: It is not an exact science, I am afraid. It is just something that with experience you hope to get right. But there is not an exact science, or at least I have not discovered it. You just have to [think] how serious are these aggravating factors and how persuasive are the mitigating factors; mitigation for the offence and mitigation for the offender. And certainly mitigation for the offence, if there is any mitigation for the offence, can be quite a powerful weapon in the hands of the defence in reducing the level of gravity. Mitigation for the offender of course is also very important but not so important if there is a dreadful list of convictions.

The minority view, held only by one interviewee, was that each aggravating and mitigating factor is weighted equally. Consequently, one aggravating feature acts to cancel out one mitigating feature:

M8: [An equal number of aggravating and mitigating features] balance each other out, yes. That is the way I view things I am pretty sure others are of the same opinion.

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<sup>25</sup> See discussion on factors which act to push the offence over the custody threshold, section 7.2.4

The value and type of property was considered important by some principally where the offender has targeted particular goods for the ease with which they can be sold on, thereby making the offence more serious:

M1: There is property which has a ready market, which can be sold off. So I think that would have an impact, making it more serious or less serious as the case may be.

Magistrate One also held that the sentimental value of the property should not be overlooked:

M1: If someone has stolen a wedding ring or something of great sentimental value which cannot be replaced, it then does not matter what the value of it is in monetary terms because the value of it to [the victim] is above money. So that will be taken into account as well.

Other magistrates appeared to view the value of the property with less importance, claiming instead that where the property is not recovered, the court will try to order compensation to the value of the stolen goods, where the offender is in a position to make the payment. Although this practice seeks to minimise the harm caused to victims by effectively returning them to their position before the offence occurred, it does not reflect the increased culpability of the offender where high priced goods have been targeted.

### 7.2.7 Guilty plea

It is a long-standing common law principle that a sentence discount is awarded to an offender who enters an early guilty plea.<sup>26</sup> This discount is reduced for the person who pleads guilty on the day of the hearing. On the whole, interviewees demonstrated a

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<sup>26</sup> For example, see *De Haan* (1968) 52 Cr App R 25. In 2004, the Sentencing Guidelines Council published its guideline, *Reduction in Sentence for a Guilty Plea* (SGC, 2004). This was subsequently revised by the Council's, *Reduction in Sentence for a Guilty Plea: Definitive Guideline Revised 2007* (SGC, 2007).

consistency in approach concerning guilty plea, a uniformity no doubt aided by the clear and definitive guidance available which leaves little judicial discretion.

In cases where the evidence against the defendant is so overwhelming that the defence could not credibly enter a not guilty plea, there were varied approaches as to whether a full discount of one-third would still be applied. Judge One was of the opinion that any defendant, regardless of the strength of his case, should be given full credit for entering an early plea:

J1: I will give a third off to anyone who pleads. I have not yet got to be in the position where I have said "you were so banged to rights you had no alternative" because they *do* have an alternative. They can string the court along if they want to.

Judge Two was of the opinion that an offender with a weak case would still be given credit for a guilty plea, but a reduced discount may be applied. However, the interviewee continued shortly after to explain that appeals are likely to be successful where full credit is not given for a guilty plea, although it was accepted that the likelihood of an offender successfully appealing on the basis of insufficient mitigation for a guilty plea may have changed since the Sentencing Guidelines Council's guidance was published, clarifying the position:

J2: Effectively, it comes down to, was he caught red handed? Would there have been a defence? But even where they are caught red handed you still give them credit [albeit a reduced level]... I have only had one [case where I did not award the full discount for a guilty plea] and they were successful in the Court of Appeal.

Similarly, to Judge One above, Magistrate Four, the District Judge (Magistrates' Court) claimed that a full discount would be applied equally in all cases where an early plea is entered, regardless of the strength of the prosecutions' case, but a reduced discount (or

indeed no discount at all) would be offered where the offenders enters a guilty plea immediately before the trial is due to commence:

M4: I would still give them a discount of a third, around about a third if they have actually pleaded guilty. I think the person who is in that position and changes his plea of the day of the trial and the witnesses are all there, probably in that situation I would not give any discount.

During the course of the interviews it became apparent that an early guilty plea can act to bring an offence below either the custody or community threshold. Not only does a guilty plea affect the quantum of sentence, it may also change the sentence type imposed:

M4: One might be thinking in terms of a short custodial sentence, but because of an early guilty plea it comes down to a high community order.

Such a comment leads to one of two possible conclusions. Either the approach for dealing with a guilty plea is less arithmetic than the guidelines suggest, or the courts have fashioned a model of substitutability amongst different sentence types allowing them to move from one sentence band to another whilst imposing sentences of equal punitive measure. In other words, were the court considering a period of imprisonment, rather than imposing a shorter custodial sentence in light of the offender's guilty plea, the court can impose a community sentence which is equally as punitive as a reduced term of imprisonment. In light of the sentencers' comments that they *do* provide a discount of one-third for an early guilty, the conclusion appears to be that the courts have formed a model of substitutability amongst different sentence types.



### 7.2.8 Previous convictions

All interviewees expressed a view that previous convictions can be an important part of the sentencing process, although they were careful not to overstate the role played by the offender's prior criminality. Interviewees tended to note an important, but limited, role afforded to previous convictions:

M3: I think [previous convictions] are important but on the other hand...they have actually served the sentence for what they have done before. You take them into account but not wholly depending on that. Some magistrates look at it differently. I look at it that they have already been punished for that already (*sic*), but you do take it into account, but not too highly.

Not only are previous convictions given a limited role through the argument that to give them a more central role would lead to an offender being sentenced twice for the same crime, but furthermore only relevant (similar) convictions are taken into account. In a case of theft, prior thefts and other property and dishonesty offences would, no doubt, be considered. Offences of a wholly dissimilar nature would not be considered and would not affect the sentencing decision:

M5: [Previous convictions] would play a role if they are relevant... If they are similar offences then they are relevant. If they are not, or are over ten years, then remove them from the situation. If they are then they become part of the structure of the decision and the guidelines take care of that.

Previous convictions were viewed as most important where they indicate a pattern of offending, thereby explaining the consensus view that only relevant (similar) convictions are taken into consideration at the sentencing stage.

M4: [The offender's prior record is] significant if it shows a pattern of offending... You *have* to look at [similar] previous convictions when determining the penalty. I know they are a penalty served, and some people might say they are gone, been done and dusted and you should not

pay any attention to them, but you *have* to because it shows a pattern of offending and it assists the way in which that punishment has to be imposed.

Guidance has long been available to the sentencing court, detailing the importance of similarity in previous convictions. The Magistrates Association Sentencing Guidelines instruct magistrates to:

“Consider previous convictions, or any failure to respond to previous sentences, in assessing seriousness. Courts should identify any convictions relevant for this purpose and then consider to what extent they affect the seriousness of the present offence.”<sup>27</sup>

In spite of the changed statutory role of previous convictions, the Criminal Justice Act 2003 retains reference to the similarity of offending. Section 143(2)(a) of the Act requires the court to:

“treat each previous conviction as an aggravating factor if... the court considers that it can reasonably be so treated having regard... to the nature of the offence to which the conviction relates and its relevance to the current offence.”

Case law dating back further is indicative of a similar approach towards the relevance of certain types of previous convictions. The offender in *Williams*<sup>28</sup> had pleaded guilty to four counts of obtaining by deception. His record of dishonest convictions was taken into consideration, but a previous conviction for rape was not relevant.

The question of how much impact previous convictions can have on sentencing was not one with a seemingly easy answer:

M1: You will find some people who have been shoplifting their whole lives and they have got dozens and dozens of [previous convictions]. They are almost hopeless cases in some ways. There is a core reason: it is usually drugs. When you have got someone who has been on drugs for 10, 15,

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<sup>27</sup> Magistrates' Association(2004), at 9. An identically worded passage was also included in the 2000 edition of the Guidelines.

<sup>28</sup> (1983) 5 Cr App R (S) 244

20 years, then they will have racked up quite a lot of similar offences. So that is taken into account. You have to put a weighting on it obviously. You would not think that just because someone has done eight or ten previous shoplifting offences, you would not then lift up the penalty to any particular level because of that, but you would want to take that into account. [You want to make sure that the sentence reflects the offence] rather than what has gone before.

It became apparent during the course of the interviews that the offender's prior record does not play a central role in sentencing; the seriousness of the immediate offence remains the chief determinant of the penalty:

M8: I do not think the sentence is ever driven by the record. I always guide people to think of the record as the last thing. I would say that the antecedents is the last thing to look at and should not drive the sentence.

On the effect that previous convictions might have on the sentence imposed, some interviewees were clear that the type of penalty could be increased (from a fine to community, or from community to custody) as a result of the presence of previous convictions, although as mentioned above, it is not easy to say by how much the sentence should be raised:

M5: [Where the offender has previous convictions for similar offences,] you would look at a heavier penalty, yes.

Other interviewees appeared to suggest that, rather than merely inflating the sentence to take into account previous convictions, the prior criminality may lead the court to take a different approach to sentencing, perhaps with a greater emphasis being placed on rehabilitation. This may not mean that the offender is necessarily made subject to a more punitive order *per se*, but rather a different type of sentence is chosen by the court by the fact that a different approach has been adopted:

J2: If it is a minor offence of theft, the previous convictions may well be pushing you towards rehabilitation because it is recognising a pattern under which lies a drug problem.

That being said, Magistrate Two suggested that where the offender has a number of previous convictions and has failed to comply with previous court orders, custody may be inevitable as the only option remaining:

M2: If they are habitual and they have had warnings and they have had a community order to help with their thieving or drugs, and its just not working and they have not attended or whatever, it will affect me because then I will just say 'custody'. I would announce that 'you have ignored the help we have given you [under] previous court orders'.

Similarly, Magistrate Seven suggested that the custody threshold could be crossed where a persistent offender has failed to comply with previous court orders, and where the court has no faith that any available non-custodial order would be effective:

M7: If someone is a persistent offender for shoplifting, the time comes where enough is enough. They have probably had probation orders in the past and, for whatever reason, they have probably breached them. But we have got to protect the public and deal with them by way of custodial sentences.

The responses to questions concerning previous convictions showed the courts were only too aware of the complexities involved in taking prior offences into account at sentencing. A Crown Court Judge believed it to be a difficult balancing exercise:

J2: But the thing you have got to be very, very careful of about previous convictions is that you are not punishing someone yet again for what they have done before. Yes, it is an aggravating feature but it does not assume such proportions as to mean in effect they are being sentenced twice.

A small number of interviewees also spoke of the importance of a lack of previous convictions. Whereas a pattern of offending can be an aggravating feature, a clean prior record can act as significant mitigation. This seems to leave no neutral ground; either the

offender will receive a discount for his clean record or any previous convictions will be used as a source of aggravation:

J1: What is very important, and I pay great regard to this, is the absence of previous convictions. I think we all do. It is a hugely mitigating feature that someone is doing this for the first time. I am not particularly persuaded by the fact that he has not got any convictions for stealing from a shop but he has got 1,001 previous convictions for burglary, or vice versa. *I am impressed by the fact that he has never been in trouble before.*<sup>29</sup>

The above quote by Judge One claims that a lack of *any* previous convictions, whether of a similar nature to the current offence or not, is a significant source of mitigation. Previous responses by other interviewees had demonstrated that relevant (similar) previous convictions are aggravating, but the existence of dissimilar previous offences are *not* an aggravating source. Together this leads to the conclusion that the only middle-ground (where prior record is neither mitigating nor aggravating) occurs where an offender has only previous convictions of a dissimilar nature. He would not be entitled to mitigation for a clean prior record, but his record would not be aggravating since the convictions are of a dissimilar nature to the current offence.

Where the offender has previous convictions but there has been a break in offending, the court may also award him credit for this:

M7: If they have been of good character for five years, we would probably give them credit for that and take no action against offences before then because we consider those to be spent.

The practice of affording a role to previous convictions at the sentencing stage was lauded by one Crown Court Judge as representing a “sensible” change in policy from the previous position under the Criminal Justice Act 1991 (as relevant to this study’s sample) where prior offending played no aggravating role in the sentencing decision:

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<sup>29</sup> Emphasis added

J1: Historically, if you go back to 1991 and the Criminal Justice Act, we were not allowed to take account of previous convictions. They did not aggravate, it did not make it more serious if you committed another offence because the argument was you had had your medicine for that one, it either worked or it did not, and now you ignore it. We have turned from that position and sensibly recognised that people who repeatedly offend have more sentencing problems to be addressed, or create more sentencing problems, with more concerns to be addressed.

### 7.2.9 Previous sentences

Once it had been established that (some) previous convictions are relevant at the sentencing stage, the interviews proceeded to consider whether the sentencing decision may be affected by prior sentences imposed on the offender. It was apparent that the courts pay more attention to whether the offender had complied with previous orders, rather than the mere fact that the offender had previously been made the subject of a particular type of sentence before:

J1: [Previous sentences] can demonstrate whether the offender has responded to supervision and community sentences. If you see that community sentences have been imposed in the past and you see breach after breach after breach, then you know it is going to be a complete waste of time in taking the risk *now* to impose a community order. So the type of sentence, yes, but more importantly whether that sentence has been complied with is also a feature which will appear on the antecedents as a conviction for breach.

It became clear that the courts do not merely ratchet up the sentences previously imposed. Rather, the main determinant of sentencing continues to be the seriousness of the current offence:

J2: But [the] length of a sentence of imprisonment probably will not have an impact upon you approving a sentence of imprisonment because you have to sentence according to the culpability of this particular matter. Therefore the fact that it was nine months last time does not mean it has to be twelve months this time, if you see what I mean.

A similar point was also made by the District Judge (Magistrates' Court) in stating that the decision to imprison is formed chiefly in reference to the seriousness of the current offence. Where an offender has previously been imprisoned, subsequent custodial sentences do not necessarily automatically follow:

M4: You are still judging the new offence with his current circumstances and the mere fact that he has been in prison six months before or six years before does not necessarily mean that you are going to stick him back in prison.

Interviewees were also asked whether a custodial sentence was more likely to be imposed in cases where the offender had previous experiences of incarceration. The Crown Court Judges gave the impression that earlier custodial sentences could have an effect on sentencing, albeit only a slight impact:

J1: I am slightly more hesitant of [imposing a custodial sentence for a first time] because quite often the point made in mitigation is that this would be the first prison sentence and that, as you can appreciate, is going to be tough in itself.

Judge Two agreed with this point and elaborated further, stating that the absence of a prior prison sentence has greater effect than the fact that an offender has previously been incarcerated. It therefore appears that the absence of a prior prison sentence may play a role in mitigation:

J2: It is more a question of the absence of a prison sentence and the impact on your sentence, rather than the presence of a previous prison sentence meaning custody is inevitable. Custody, from my perspective at least, is only inevitable where the gravity of the offence or the culpability of the offender require it, or the law requires it.

Magistrates, on the other hand tended to disregard the offender's previous custodial experiences, basing their decision to imprison squarely on the seriousness of the current offence:

M1: If the offence passes the custody threshold then the custodial sentence would be passed... There are times I think when we pass custodial sentences because we think that the offence is so serious and it is the only sentence that could be passed. Perhaps we do it sometimes with a little bit of reluctance, but if that is the sentence that is what needs to be passed.

That being said, Magistrate Seven offered a different attitude by claiming that the bench would look at the reasons why the offender had previously been imprisoned, alluding to the court's interest in factors other than the immediate offence and the offender's current circumstances:

M7: If he has had a previous offence, for whatever, and he has served time in prison for that, then we would certainly take that into account, with the reasons why he was sentenced to imprisonment; it might be that it was a number of offences prior to that that they sent him down for.

The perceptible difference in approach between the two courts may be explained by the magistrates' reliance on sentencing guidelines, which do not make reference to previous sentences as being either mitigating or aggravating. If the guidelines do not draw the magistrates' attention to a particular issue (such as prior sentences) it may be disregarded. Judges, on the other hand, are not constrained by the same guidelines and may be more willing to consider factors beyond those mentioned within guidelines.

The sentencing procedure can be affected by the fact that an offender has previously served a custodial sentence. The court is not necessarily obliged to request a pre-sentence report in such cases, and can proceed straight to sentencing:<sup>30</sup>

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<sup>30</sup> Section 156(4) Criminal Justice Act 2003 (and previously section 36(5) Powers of the Criminal Courts (Sentencing) Act 2000) provides the court with a power to pass sentence without first obtaining a pre-sentence report if "the court is of the opinion that it is unnecessary to obtain a pre-sentence report." Where an earlier report exists in relation to the offender, the court may decide to utilise the previous report, rather than ordering a new report be produced, when passing sentence.



- M4: [If an offender has previously served a custodial sentence, it makes it more likely that another would be passed] only in terms of I would not necessarily have to have a pre-sentence report before sentencing.

#### 7.2.10 Criminal Justice Act 2003

The judges along with those magistrates who had a number of years' experience sitting on the bench, were asked how sentencing policy and practice had been affected by the Criminal Justice Act 2003. This was an important inclusion for the interviews as the data collected from the sample of CPS files predated the enactment of the 2003 Act. Responses to this question were generally answered in the negative: that the Act had made little or no difference to sentencing practice, although the suspended sentence was noted as having been made "much more realistic by the imposition of...community requirements."<sup>31</sup> The courts may thereby make greater use of the suspended sentence order than under the previous sentencing regime. As a custodial sentence, a suspended sentence order is subject to the same custody threshold as immediate imprisonment: a custodial sentence, whether suspended or not, can only be imposed where the offence is so serious that a fine or community penalty cannot be justified.<sup>32</sup> If suspended sentences are to be used more frequently, they should be used solely as an alternative to a period of immediate imprisonment. That being the case, a rise in the use of the power to suspend a custodial sentence should result in a reduction in the use of immediate imprisonment.

One Crown Court Judge noted that the community sentence *may* be more widely invoked following the restructuring under the Act. However, similarly to other comments made by

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<sup>31</sup> Per Judge Two

<sup>32</sup> Section 152(2) Criminal Justice Act 2003

the Crown Court Judges regarding practices within the magistrates' court, this is based on a perception of the magistrates' court practices and does not necessarily reflect true practices:

J1: No... [although] the Criminal Justice Act 2003 [extended] the powers to impose requirements under a community order, about eight or nine of them (*sic*)...[which] has had greater sanction made available to the court to deal with offences which are lesser offences, offences of the nature of theft. So I think the answer is [the Act] *may* [have had an impact on sentencing practice] because of the extended powers to impose requirements on community orders; it may well be the case that less (*sic*) cases have gone to prison.

The District Judge (Magistrates' Court) was of the opinion that the 2003 Act has had very little impact on sentencing practice. The Act has changed the names of various penalties, such as the rebranding of various community-based sanctions, but the nature of the penalties and the cases in which each are imposed have not been subject to change. This can be directly contrasted with the comment made by Judge One, above:

M4: I do not think [that the 2003 Act has affected sentencing practice]. I do not think it has had very much impact at all. It basically takes us through different hoops that we have to consider before sentencing that we went through anyway. The government tinkers around with the law and basically it all boils down to things we have been doing for centuries. We go through all the hoops, it is just that they put them in different orders or they call them by different names, they keep changing the community orders that we have; you have to try to remember those for a few months until the government decides to have another tool around. They are always tinkering. I am sick and tired of them. Whichever government it is, whether it is Labour, Tory, they all like to tinker around just to show they are doing something. It has in the Crown Court, in terms of dangerousness and extended sentences and so forth, but at this level, no.

The lay magistrates tended to be of the opinion that sentencing practice has changed over recent years, but this is the result of changes to the sentencing guidelines rather than any noticeable effects of the 2003 Act:

M1: I have been on the bench [for] eight years and there have been quite a lot of changes... so people who have been on the bench for 20 years will probably tell you that there is a leaning towards community style punishment as opposed to custodial sentences, but very much magistrates and judges are to a great degree bound by the guidelines: we have to bear in mind the guidelines that we have, and they have changed over the years.

### 7.2.11 Multiple Offending

Chapter 5 illustrated the relatively common practice of theft offenders being charged (and subsequently sentenced) for more than one offence at the same hearing. This may be because a number of offences had arisen from a single transaction,<sup>33</sup> he had offended whilst subject to a court order for which he is now held to have breached,<sup>34</sup> or had been on a “spree”.<sup>35</sup> Magistrates were asked how such circumstances were dealt with at sentencing; whether a single sentence is imposed, reflecting the totality of the offending, or separate sentences are provided for each offence, determined solely on the basis of that offence, which in turn may be imposed consecutively or concurrently to one another. The purpose of this question was to aid an understanding of how other offences may affect the sentence imposed for a theft conviction.

The interviewees’ responses indicate divergent practices being employed when dealing with multiple offending. On the one hand, the court may impose a sentence for the most serious offence, which is deemed appropriate for that offence, whilst imposing no separate penalty for the other offences. In effect, only the most serious offence is dealt with; the other offences may not influence the sentence for the more serious offence, nor do they receive their own sentences. Alternatively, the court may impose the same sentence for each offence to run concurrently and, if necessary, amend the quantum of the penalty to account for the other offences. Both of these approaches were outlined by Magistrate One:

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<sup>33</sup> For example, cases 114 and 115: the offender had closed a company bank account after he had, on at least two occasions, extracted funds from the account which he placed into his own.

<sup>34</sup> For example, case 142: the offender had committed theft in breach of a conditional discharge. She was also convicted for two counts of failing to surrender to bail.

<sup>35</sup> For example, cases 104-107: the offender committed four counts of theft from a shop on a single afternoon.

M1: It depends on the circumstances. Totality is important. If he gets a community punishment then he gets the same community punishment for all three...so you just have the one punishment, which is a community punishment. And we may perhaps up the term of the community punishment, or the length of unpaid work, if that is what he is getting, because there is more than one offence so they would be taken into consideration. In the circumstances, we might give a penalty which we thought was appropriate on the more serious offences and then we may impose no separate penalty on the others. But it is a case of totality I think. You have got to have a sentence which is proportionate to the offence.

A third approach was detailed by Magistrate Eight, whose own practice involved sentencing for each offence separately, before ensuring that the overall package is appropriate for the totality of offending:

M8: When someone is up for multiple charges, you always look at the most serious first and then you look at all the others. Then I guide the bench if I am chairing, and we go through the exercise and sentence each one as separate offences, and then you look at the total package. And if the total package looks excessive, you can start amending the sentences for each one. But each one should be recorded.

Furthermore, Magistrate Seven suggested a practice more in line with what Magistrate One detailed above, where only the most serious offence is sentenced for. However, unlike Magistrate One, Magistrate Seven claimed that other offences are treated as aggravating factors to the more serious offence. Although no separate penalty is given for the other offences, they are accounted for within the sentence for the more serious offence:

M7: I would look at the seriousness of all the offences. If they have all been picked up on one offence, been stopped on one occasion, [I would] look at the most serious one and then deal with the others in totality. So that one offence we are dealing with, we would add to that as aggravation the fact they have committed all the other offences within it; so we would deal with it on a totality situation.

It also became apparent that in some circumstances, such as where an offender commits a number of thefts and is placed on bail for each offence before committing the next offence, the court may impose a custodial sentence based on the totality of offending, even where each individual offence does not in itself warrant more than a community-based penalty,

seeming to suggest that the multiple offender is treated more punitively than an offender who appears in court for one offence on a number of occasions:

M4: [Multiple offending] might [lead to a custodial sentence where each individual offence is not serious enough to warrant custody]. It depends... Having committed four offences, perhaps offending on bail which is an aggravating factor, it certainly could result in a prison sentence if the person commits an offence, is bailed, commits another offence, is bailed and appears in court with four or five offences, then the aggravating factor could take it over the custody threshold even though, individually with one offence, [it] might have resulted in a community order...[That being said] it would not *necessarily* result in it being taken from one band to another.

Conversely, if the offender has offended on a 'spree' and is only apprehended after committing a number of offences, Magistrate Seven had claimed that such an offender would be sentenced more leniently than one who appears before the court charged with one offence on a number of occasions:<sup>36</sup>

M7: I think the person who comes to us with three or four offences will get off lighter; it will be a more lenient sentence than it would be for three separate ones.

It thereby appears that the courts take a stronger view of an offender who is placed on bail and subsequently defies that privilege by committing further offences, leading to potentially more severe sentencing, than an offender who is apprehended once having committed of a number of offences.

## 7.2.12 Concluding Remarks

The foregoing discussion has indicated some inconsistent practices amongst individual sentencers, not least in terms of the sentencing purposes employed. In cases concerning

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<sup>36</sup> Similarly, Albrecht (1994) (cited in Jareborg (1998)) provides an understanding of how German courts impose bulk discounts for multiple offenders. The discount increases progressively with each additional charge. Thus, the more serious the overall criminality, the greater is the bulk discount imposed.

young offenders, interviewees claimed that crime reduction and the welfare of the child become main priorities. Interviewees demonstrated a similarly unified approach in cases where the offender is known to suffer from a drug addiction, where the courts had indicated the appeal of rehabilitation. In cases neither concerning young offenders nor substance misusers, sentencers are less likely to agree as to the appropriate sentencing purposes.

Overall, both the magistrates' court and Crown Court appear to uphold the seriousness of the offence as the primary sentence determinant. However, an offender's previous convictions can have a significant impact on the sentence imposed. Magistrates had claimed that a first theft offence would usually warrant a fine or discharge, it being unusual for a community order to be imposed for a first offence. Rarer still would it be for the court to impose custody for a first offence, although doubtless there are occasions where the seriousness of the offence warrants imprisonment, regardless of the offender's prior history. Community penalties were viewed as an important sentencing band for acquisitive crime since many offences are committed to satisfy a drug or alcohol dependency.

The imposition of a fine in the magistrates' court did not rely on the offender being in a stable financial position. The decision to impose a fine is based on the seriousness of the offence; the offender's financial means appears to have no bearing on this decision. However, the level of the fine is determined in line with the offenders' means. That being said, the magistrates commented that where the offender has extremely limited financial means, the court may waive a fine and provide the offender with an opportunity to serve one day in custody, the time being taken as served where the offender was kept in custody on the night before the court hearing. Such a practice could be said to cause confusion within the sentencing hierarchy under both Criminal Justice Acts of 1991 and 2003 where

custodial sentences are considered to be more punitive than any other penalty.<sup>37</sup> The interviews made it apparent that the offender is not expected to pay the fine; the offer of custody in lieu is made because of the offender's perceived lack of finances to make the payment. The sentence in effect is a custodial sentence masked behind a financial penalty since the offence seriousness does not warrant a custodial penalty. If the sentence of imprisonment in lieu of payment of a fine is deemed to be a custodial sentence, it would contravene the minimum custodial term of five days under section 132 of the Magistrates' Court Act 1980.

The Crown Court judges viewed custodial penalties as unlikely outcomes for thefts tried in the magistrates' court. Collectively, magistrates listed a number of occasions when custody would be considered, the most likely of which is thefts committed in breach of trust. Magistrates also claimed that custody could be imposed on the basis of repeat offending, particularly where the offender had breached previous court orders. In such instances, custody is not warranted on account of the seriousness of the offence, rather it is viewed as the only meaningful option.

Although the seriousness of the offence was held as the chief sentence determinant by both judges and magistrates, there appeared to be no definable method of dealing with offence aggravation and mitigation. Almost all sentencers interviewed had suggested that some factors are more important than others, although they were unable to explain how the weightings of each varied. The only exception to this was Magistrate Eight who asserted that all factors are equally weighted and, consequently, one mitigating feature would cancel out the effect of an aggravating feature. This approach was not expressed by any other

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<sup>37</sup> According to s.1(2)(a) of the CJA 1991, the court could only impose a custodial sentence where the offence, or combination of the offence and one other offence associated with it, was so serious that only a custodial sentence can be justified. This was subsequently amended by s.152(2) of the CJA 2003 to state that the offence must be so serious that neither a fine alone nor a community sentence can be justified.

interviewee. On the contrary, some responded to questioning by stating that the approach in dealing with aggravation and mitigation is based on experience and is not mathematical or other ways calculable.

Previous convictions were clearly important in determining sentence, although most sentencers were only too aware of the dangers of double-punishment if prior record was granted too central a role in sentencing. Only recent and relevant convictions were deemed to have any noticeable impact on the sentencing decision, although that is not to say that the sentence would be increased by any particular amount in light of the prior history. Prior sentences would be considered by the sentencing court, though only in respect of determining the offender's propensity to comply with court orders. A sentence would not be inflated to reflect prior sentences as part of a 'ratcheting up' exercise.

Pre-sentence reports drafted by the Probation Service were, on the whole, viewed positively by interviewees, being considered as a useful tool in uncovering the offender's circumstances. The recommended sentence was considered by most to be merely advisory; none of the sentencers interviewed felt compelled to follow the proposal given. The perceived expertise of the Service encouraged the sentencers to give thought to the contents of the report. Judges tended to hold pre-sentence reports in less high regard, claiming to read the recommendation first and disregard the remainder of the report if the proposed sentence was not deemed realistic. In theft cases, judges in the Crown Court would usually hear the most serious forms of the offence, where custody may be being seriously considered. Keeping in mind the reports' perceived disregard for custodial sentences,<sup>38</sup> judges may be less inclined to follow the reports' recommendations, believing them to be unrealistic.

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<sup>38</sup> See section 7.2.2.



### 7.3 Interviews with Probation Officers

Toward the closing stages of the interviews with sentencers, it had become apparent that the courts regarded pre-sentence reports as an important source of information and, therefore, acclaimed them as a useful tool to be used during sentencing. Views concerning the influence of the recommended sentence contained within the report differed between those who would consider following the recommendation provided it was viewed as being realistic, and those who largely disregarded the recommendation as encroaching on the sentencers' jurisdiction. This being the case, it became desirable to examine the contents of the reports and the philosophies and practices of the reports' authors. The request to access court files and the pre-sentence reports contained within was denied. As an alternative means of accessing comparably similar information, seven interviews with probation officers were organised and took place between July and October 2009.

#### 7.3.1 Roles of the probation officer and report

The officers were unanimously of the opinion that their role was primarily to assist the court by presenting information relating to the offence and the offender which may aid the court in its sentencing decision.

P1: Our role, from my point of view, is to provide the court with information on the offender's current circumstances, some of the history of the offender, and not just in terms of the offending history, but the offender's history.

A secondary role of the probation officer in their capacity as authors of the reports is to inform the court of what she perceives to be the most suitable disposal option for the offender:

P2: I see the role as a provider of information first of all. So I am giving [the court] a snapshot of that person's life. Obviously I am only interviewing for an hour and a half, so it is only a snapshot, and it relies on what they tell me... And also I am telling the courts what I think would be the best resources available to manage that person's risk and their offending behaviour.

P6: Primarily we are officers of the court. We are there to advise the court, in a sense... Looking at the facts of a theft, I can probably advise the magistrates as to the best way to go, should they have any uncertainties.

A number of officers expressed that the reports should be objective:

P1: My opinion is a report is bias free, it is opinion free. You look at what the situation is. If the court is looking at custody because they have indicated that at the first appearance, [then we look at] what the impact of custody is going to have on them... If it is going to impact on work, accommodation, the offender themselves.

Interviews with magistrates and judges showed a firm belief amongst the sentencers that the pre-sentence reports offered the courts a valuable source of information regarding the offender's character and his risk of reoffending. Similar sentiments were voiced by the probation officers. Owing to the Service's work with other agencies, the report is able to include information from a number of sources which would not be readily available to the courts:

P1: It would be difficult for the court to get the information because we, as appropriate, get in contact with the other agencies. So it could be that we are in touch with the police, social services, child risk, housing... It all ties up the other areas. Otherwise you would be waiting for reports from here, there and everywhere.

Other officers believed that the offender may be more receptive to questioning during the interview either because the interview takes place in a less formal setting than the courtroom,

or because the offender views the officer as an associate of the defence team. There remains, however, the unresponsive offender who refuses to engage with the officer during interview:

P3: I suppose because you interview them [after conviction or their guilty plea], it is just you and the offender. It is more informal than, say, in court. So I think that they would be more likely to open up.

P2: We will get people who say “can you tell [the court] this, and can you tell [the court] that”. I explain that that is not what I am here to do... I will base [the report] on what I think and the resources. I think they see us as a connection with their solicitor... So in some ways they are quite receptive...[but] sometimes you will get someone who sits there and says “I am not prepared to talk to you at all.” They are usually quite difficult, obviously.

### 7.3.2 The focus of the report

Magistrates and judges had demonstrated a central role in sentencing being afforded to the seriousness of the offence. Since the enactment of the 1991 Act, report writers have been required to consider and evaluate offence seriousness and to ensure that their recommendation reflects this.<sup>39</sup> Nonetheless, in a study of the legislative impact on pre-sentence reports, Cavadino found that a significant minority of reports (27 percent) contained no explicit or implicit reference to offence seriousness.<sup>40</sup> In such cases, the reports tended to justify the recommendation on the basis of the “sentence’s likely effectiveness in producing a positive response from the offender.”<sup>41</sup> Probation officers were asked whether their reports focus principally on the offence or the offender. If the latter, the courts could in fact surreptitiously be sentencing primarily for the offender rather than for the offence where the reports’ recommendations are followed. All officers confirmed that the reports consider issues relating to both the offence and the offender, with some claiming that the

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<sup>39</sup> Home Office (1992), at 13-14

<sup>40</sup> Cavadino (1997), at 535

<sup>41</sup> Ibid, page 536

two are inextricably linked. Some explained that the offence is the starting point, but the focus then moves on to the offender, in particular whether the offender is able to comply with a community order, or similarly, how the offender's life can be transformed away from criminal behaviour:

P1: I am focusing on whether they are going to be able to comply with a community-based sentence. Obviously you take the offence as a starting point, but my main concern is, if we are looking at a community sentence, (i) are they going to comply with it, and (ii) is it going to benefit them? It is pointless putting someone on an order that they are either not going to bother to turn up to, or turn up just to tick a box.

P5: In the report the main thing you are thinking about is how can we work with this person to make their life a pro-social, non-offending life.

Officer Six explained that the focus of the report may move from the offence to the offender (or *vice versa*), depending on the particulars of the case. The nature of the offence will take precedence where the crime is especially serious, particularly where the custody threshold has been crossed; the offender's characteristics are not going to be sufficient to tempt the court away from a custodial penalty. Where the offence is less serious and the offender has certain issues to be addressed, the focus lies on the offender:

P6: If you have got someone with no previous convictions but it is a £100,000 theft, you know you are going to be in difficulty because it is a serious amount of money... You might say it is a theft of £10 but it is someone who is a heroin addict who is shoplifting to get their next fix, so that sends you in a different direction. So it is a combination of the two factors together that you have to balance... To get the full picture you have to combine them both.

A similar opinion was given by Officer Four, who claimed that the offender of a minor theft is the focal point of the report, suggesting that the same is not true for more serious offences:

P4: Some reports focus more on the offender, depending on the offender's issues. Some reports might focus more on the offence depending on the seriousness of that offence [and the] impact of that offending. I would say that for general small theft offences, you are looking at the person more than the offence itself.

Were the court to follow the report's recommendation, the report's focus on the offender does not necessarily mean that the seriousness of the offence (which was heralded by the sentencers in interview) is overlooked. The court will often provide a sentencing bracket to the probation officer to indicate where on the sentencing hierarchy the court is looking. Probation will then make a recommendation usually within this prescribed range. The seriousness of the offence is taken into consideration within the bracket stipulated by the court. The offender's characteristics and needs are then accounted for by the report author in determining the most appropriate disposal option available within this range:

P2: The court is supposed to put in a sheet where they tell us whether they are considering anything from a fine right up to custody, but...we do not always get that. So a lot of reports come through [as] an all-options report, so that says we need to cover anything that could be given to them, which makes the report quite longwinded because you are going "well they are not suitable for that programme, they might be suitable for a curfew, they might be suitable for unpaid work", and you are grasping at everything to try to make sure that when they give them a sentence, they don't give them something that we cannot work with... But we are supposed to get a sheet that says "we are looking at 16 weeks' custody", and you need to think on that lines of what would be manageable or acceptable within that range. So they are more precise [than all option reports], because you know that they are looking for a programme, something quite substantial.

Following the interview between officer and offender, new issues may become apparent which were not known to the court at the time of determining the prescribed range. Where this occurs, the officer may report the issues and propose a sentence outside of the range:

P2: Yes [the proposal may fall outside of the prescribed range]... Sometimes the information that comes forward, you start seeing something they have not mentioned to anyone and they start to reveal that, and you realise that the custodial sentence [prescribed by the court] is going to be a really bad move, and that they really need to go in [a different] direction. Particularly if they are suicidal or need mental health, which sometimes does not get picked up until you start interviewing them and then you realise their mental health is significant.

### 7.3.3 The recommended sentence

The probation officers were asked for their views on the role of the recommended sentence within the report. The responses were unanimous in saying that the proposal should evince what is perceived by the report writer to be the most 'appropriate' disposal option. The determination of the most appropriate option should be made in reference to what is appropriate for the offence and the offender, whilst also being mindful of what the court would accept as a realistic recommendation:

P3: [The recommendation is] just the conclusion as to the best and most appropriate sentence, not just for the offence that has been committed but also for the offender as well. So it has to be appropriate not just to the offence, the magistrates' or judges' wishes, but also for that offender. There is no point giving them an order which will just set them up to fail, which happens sometimes.

None of the probation officers expressly mentioned that the offence's impact on the victim, or the interests of society in general would be taken into consideration within the recommendation, notwithstanding the fact that one section of the pre-sentence report focuses on victim impact.

With this in mind, officers were also asked whether they believed the recommendation acts to merely inform the court of an appropriate sentence, or whether it goes further toward influencing the court's decision. Once again, the responses were consistent with one another. By detailing what is considered by the author to be the most appropriate disposal option, the officers thought that the courts would (or at least should) be influenced by the recommendation. Moreover, the proposal is not divorced from the rest of the report; rather it is a conclusion based on the aforesaid details on the offence and offender. Consequently the recommendation should appear fitting to the preceding information of the report:

P2: I think that if the report is structured then the proposal at the end should make sense... To me it is a commonsense line of thinking that I am putting together. I would hope that when [the court] reads that, they would see that and they make the decision based on the best resources available.

One probation officer maintained that the role of the recommendation is threefold: to inform, to guide and to instruct the court:

P3: [The recommendation] does inform [the court], it guides them, and in a way it can instruct them as well.

The recommended sentence constitutes the most appropriate option in the eyes of the report's author. The officers are eager to stipulate in the report any penalties for which the offender is deemed unsuitable, whilst providing reasons for this conclusion. The officers were aware that where a disposal is not expressly rejected and goes unmentioned in the report, the court may assume that the order was overlooked and may impose it regardless. The eliminated disposals are thus equally as important as the final recommendation:

P4: For me, it is more powerful to say "they are not suitable for unpaid work programme, drug rehabilitation requirements, mental health" than it is for me to say "this person is suitable for supervision". If I do not state that they are *not* suitable, the court feels that we have not dealt with them; they assume we have not dealt with them and will therefore give it to them anyway because they do not feel that they have been given a harsh enough sentence, when actually that is not the case: we have looked at all of the options, we have come to the best conclusion and we have given it to the court. What [the courts] want is to know what they can and cannot give. As long as you state they cannot give something, if they then give it and it all goes wrong or they fail, then that is the courts' responsibility.

Ultimately, the sentencing decision was acknowledged by the probation officers to be a decision for the court, with the recommendation simply stating which non-custodial options may be suitable (if any):

P6: You see the bottom line is that [sentencing] is not your decision; it is a decision for the court. What you can say is "we are available" but in a sense, how they sentence is a matter for them and depends on their view of the offence. And if they determine that, for one reason or another, the whole thing is so awful that they have got to send them to jail, then so be it.

Officers appeared to be aware of a high take-up rate of the recommended sentences by the courts, with all officers interviewed acknowledging that the courts will typically adopt the recommendation supplied within the report. However, previous research has warned against an assumption that any concordance between sentences imposed and report recommendations is necessarily evidence of the latter's influence on the sentencing decision.<sup>42</sup> Rather, report writers try to foretell what sentencers may regard as realistic sentences.<sup>43</sup> Three officers thought that the courts would follow the recommended sentence in 80 to 90 percent of all cases, suggesting that the proposal would be followed by the court if it is "sensible" and comprehensive in discounting certain unsuitable orders:

P1: If you have got a well written and well structured report, and you can justify everything you have put in there...if you can say why you have *not* gone for something [then the courts will tend to follow the recommendation made].

Two officers did sense, however, that the Crown Court is less likely to adopt the recommendation made, possibly because it has already made its decision before the report is delivered:

P1: It seems as though over here [in Coventry], especially with the Crown Court, the report can sometimes be – let us not say disregarded, not taken into account. Or they will take it into account but they have already decided what they are going to do, which can happen at any court, but my experience is it is more likely to happen [in the Crown Court].

Perhaps the real reason why the Crown Court is less likely to implement the recommendation is due to the reports' loyalty toward non-custodial sentences, which may be viewed by the Court as unrealistic in those cases where the Court is likely to be considering custody. This would be particularly true for indictable offences and either-way offences which have been committed to the Crown Court for sentencing, but less so where the defendant in an either-way offence has elected trial.

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<sup>42</sup> Carter & Wilkins (1967); Morgan & Haines (2007).

<sup>43</sup> Tata, *et al* (2008), at 840



### 7.3.4 Sentencing purposes

Magistrates and judges had, during interviews, indicated that the sentencing purposes employed depend on the nature of the offence and the offender's characteristics. Some had also stated that the purpose is determined by the sentencing bench in light of the sentencing reasons stipulated by the previous bench and the contents of a pre-sentence report, where such a report is available.<sup>44</sup> In drafting the reports, the probation officers noted that, often, the court will indicate which purposes are to be considered:

P1: The court indicates what [purposes] they are looking at, there are five different boxes for them to choose from, whether it be punishment, rehabilitation, reparation, reduction of crime or [protecting the public].

P4: We are given the guidance of five different areas for the purposes. I think that even if the court states what purposes they are looking for, by the time we have done our assessment, sometimes they might just be asking for unpaid work to be looked at. Once we have done the interview and the assessment, we might feel that unpaid work is not the best thing; that there are some underlying issues that have not been brought up, so supervision would be more [appropriate]. You then move from a punishment sentencing purpose to a more reforming and rehabilitative purpose. If the court was to request public protection for a £15 theft then I would say "no", these are not public protection cases. They are punishment or reform and rehabilitation.

Although the probation officer will usually apply the purposes highlighted by the court, they do not feel compelled to do so in all circumstances. Where the probation officer believes that, in light of information garnered during the interview with the offender, the purposes stipulated by the court appear now to be inappropriate (perhaps because of the uncovering of a particular need of the offender which was unknown by the court), they are not opposed to disregarding this and following what they consider to be a more suitable path:

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<sup>44</sup> See comments by Magistrate Eight, section 7.2.1

P5: It depends what [purposes the court has asked for], but essentially you will go for exactly what you feel at the end of the report, and it will not really matter what they have asked for... But at the end of the day you make your own mind up; you make your own decision.

The report writer may feel that a purpose other than that prescribed by the court would be more appropriate in the circumstances. If, for example, the offender's drug dependency only becomes known during interview, this may lead the report writer to suggest a rehabilitative approach, which the court had not prescribed as it was unaware of the offenders' addiction (or extent thereof) at the time of submitting the sentencing reasons form.

On the other hand, Probation Officer Seven appeared to be against the practice of departing from the courts' sentencing reasons:

P7: Normally the courts will say what the purposes of sentencing are, whether it is to rehabilitate or to punish. There are quite a few different ones. [You would usually follow this purpose]. You do not normally make it up.

### 7.3.5 Custody

Magistrates had some misgivings concerning the probation services' antipathy toward proposing custodial sentences, which may lead the courts to regard some recommendations as unrealistic. Five officers were candid about their reliance on non-custodial recommendations, often viewing imprisonment as an inappropriate disposal option in theft cases. Probation Officer Five was of the opinion that the court could be dissuaded from imposing short custodial sentences:

P5: I will write a report to try and keep [the offender] out of jail because I only agree with it for violent people, not for people who just commit theft... If [the court is considering a custodial sentence of] anything up to 12 months, you can definitely sway them [to a non-custodial disposal].

Officer Six exhibited a reluctance towards custodial sentences based on his belief that an offender should be dealt with by way of the lowest possible tariff, although concerns for public protection can necessitate a custodial term when facing dangerous offenders. Probation Officer One explained that the role of Probation in general explicates the Service's inclination towards community sentences:

P1: I think, as it stands, because of the role the probation has got, we are obviously looking for as many people in the community as possible. But if someone should not be in the community [because he poses a danger to the public], that needs to be reflected in the report.

Nonetheless, officers were asked whether they would ever consider recommending custody for theft. Five Officers had misgivings about the value of custody in such cases, in part due to the perceived worthlessness of short custodial terms and because custody fails to offer the support needed by so many convicted of minor acquisitive crimes:

P4: The thing with custody for theft is that, if they get short custodial sentences it is no good to anybody. They do not come out on licence. They do not get supervision. They do not get any kind of support. And I think they are pointless in that respect. If it is a short sharp punishment, then [ok], but if someone has got a history then it is not going to change anything.

Officer Six commented that custody is not recommended, *per se*, rather the court would be advised that the offender was not deemed suitable for a community order:

P6: You don't, as such, recommend custody. What you do is say "regrettably, I cannot help the court on this occasion." That might be where it is a massive amount of money, as I have illustrated, or the [previous convictions] are so hopeless, they are on a suspended sentence and this is their fifth theft in six months and it is all linked to drugs, and you have tried to get them on to a drug related order but they have not cooperated. The cards you are holding in your hand are completely hopeless... You usually know when you have run out of options and when custody is going to be the only one that is available.

The most commonly cited factor which would lead to a recommendation for custody, or at least no recommendation for a community order, was where the offender had demonstrated to the officer an unwillingness to comply with a community-based sentence. Where this occurred, the officers felt compelled to make this fact known to the court in full knowledge that a custodial sentence may be imposed:

P2: I have had a couple of cases where the people have used theft as a means of feeding their drug habit, and they basically turn around and say "I am not interested in doing any work at all in the community. I am not interested in attending supervision. I want a custodial sentence". And I have argued that that is not their best option, but without their say so, there is nothing that we can do. And the courts then have no option but to give a custodial sentence... I am saying that I cannot work with them unless they agree to it.

#### 7.3.6 Fines and discharges

Officers were asked if a fine or discharge would ever be proposed in a report. Concerning fines, responses were unanimous: a fine would not be recommended within a report. However, the reasons for this practice varied somewhat. Some officers suggested that a fine would be inappropriate for theft as it poses the question of how the offender will raise the funds to pay. This suggests that the officers consider fines as a sanction to be inappropriate in cases of acquisitive crime, rather than it merely being inappropriate to propose a financial penalty:

P1: I have never [recommended a fine] for theft. I would question where the money was coming from to pay the fine. People who shoplift have got issues with their finances anyway.

Other officers claimed that, where a fine is considered by the court to be an appropriate disposal, a report would not be requested. For Probation to be asked to produce a report, the offence (or offender's circumstances) would have to require a more severe penalty than a mere fine:

P5: I am assuming that if it was a minor theft, if the goods were not that high [in value], if they were recovered, if it was just literally a theft, then it would not usually go to a report. If the court deemed a fine to be okay, then it would not go to a report. I think that if they were looking at that, they would deal with it before it got to report. [If] it is not serious and they can deal with it by just imposing a fine, then it is a waste of resources [for Probation to get involved by issuing a report].

Finally, the remaining officer claimed that her preference away from fines is due to a perceived legal incapacity to propose them, rather than a discretionary avoidance of financial penalties: she did not believe that a fine could (rather than should) be recommended within a report.

Officers were more likely to recommend a conditional discharge over a fine, although a discharge would only be appropriate in cases where the offender was suffering from no underlying dependency or wellbeing issues *and* the offender did not have a long list of prior convictions, either of which would lead the officer to recommend a community order:

P4: If there are no big issues, no alcohol, drug issues, emotional wellbeing, depression, if none of those are evident, then I would quite happily ask for a conditional discharge if they haven't had one before; if it is their first or second offence.

Officer Six appeared to uphold the value of the conditional discharge more than any of his colleagues, asserting that a discharge can be the most suitable outcome for relatively minor offences where the offender is new to offending and presents a low risk of reoffending. The Officer appeared to claim that the conditional discharge may also be the least damaging disposal for such an offender, where placing him on unpaid work may be harmful by close association with others placed on the order:

P6: The interesting thing to do is try and present the court with a conditional discharge where you have got unpaid work, and you know that unpaid work is the obvious outcome, but for one reason or another you think it is better for the Service and better for the offender to go for a conditional discharge... You do not get many, but as long as you are convinced it is the right thing to do. It is usually on people with no or few recent previous convictions on less serious

offences. I get a lot of satisfaction out of getting conditional discharges for good reasons... But as I say it is in circumstances where they do not need supervision and where unpaid work is a natural outcome, but sometimes you do not want people mixing with the kind of guys we have got [on unpaid work], just like we do not want guys mixing with the people we have got in prison; that is quite a powerful argument. You do not necessarily want people mixing with the people on unpaid work, and it makes more sense to say to the court "he is a very low risk of reoffending, why do you not try a conditional discharge?" So, that is what we do.

### 7.3.7 Community-based sentences

The officers had demonstrated a negligible reliance on custodial recommendations and a complete lack of utilising fines within the proposals, leading to the conclusion that the officer would commonly recommend that the offender serve his sentence in the community; an assertion that was supported by all officers during interview. The reliance on community based penalties is perhaps unsurprising considering the nature of the Probation Service's work. Even where a custodial sentence could be justified for the offence, non-custodial alternatives are still assessed for suitability. There appear to be occasions when custody is justified but the report writer will remain hopeful that a community sentence can be recommended:

P6: I guess our role is partly to be optimistic, despite the evidence. So sometimes we are dealing with people who perhaps ought to go to jail but realistically deserve another chance.

The willingness of the Service to propose community penalties was perhaps best summarised by Officer Six. Where the seriousness of the offence does not render custody imminent, and assuming the offender seems prepared to comply with the order, the report will recommend a disposal within the community:

P6: When [offenders] go to custody, we have usually ended up with circumstances where the machinery is completely sanded up by the offender's response and/or the seriousness of what they have actually done, rather than our willingness or otherwise to take them on. If they cooperate with us then generally we will try to offer the court something.

According to Officer Seven, the community order proposed is selected on the basis of what is the most appropriate option for the offender, rather than being determined with reference to the seriousness of the offence. Although the sentence type recommended (be it custody, community-based, or a discharge), at least in part, is decided upon in reference to the seriousness of the offence, where a community sentence is selected, the precise order is determined in light to the offender's particular needs.<sup>45</sup> Where the offender has a propensity for drug misuse, this may form the focus of the reports' recommendation, providing that the offender has demonstrated to the interviewing officer an inclination to quash the drug dependency:

P7: If there are drugs involved then you are looking at a drug rehabilitation requirement... If they are not in good physical health, you do not want to put them up for unpaid work because they probably will not go and they probably would not be able to do it.

Similarly to Judge Two, Officer Six also noted that a suspended sentence order may now warrant careful consideration as it allows for the court to warn the offender against reoffending by way of an impending custodial term for subsequent breach, whilst also allowing the individual to undergo work or supervision within the community:

P6: The extra dimension that has crept into things is the suspended sentence order, which actually gives the magistrates the opportunity to try out somebody and say "we will give you 16 weeks suspended for 12 months, and at the same time we want you to be supervised and/or do some unpaid work." That option actually gives the magistrates a new opportunity where they are actually sentencing somebody to custody, but they are saying they will suspend it. And, I suppose, rather than giving a community order, they are actually deferring – it is not deferring, it is actually a suspended sentence. So that is an interesting new development which gives the person an opportunity.

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<sup>45</sup> Armitage found that probation officers were more likely to recommend a probation order (subsequently CRO) where personal or social problems had been identified that could be addressed through probationary supervision. See Armitage (2001), chapter 8.

### 7.3.8 Offence aggravation and mitigation

The pre-sentence reports, and recommendations contained within, are not shaped by offence-specific aggravation and mitigation. The officers stated that such factors are taken into consideration by the court when determining the sentence range which is provided to Probation in the Sentencing Reasons Form. To consider them further within the report as determinants of the recommendation would be to count them twice:

P1: The court will take the aggravating and mitigating circumstances into account. They start with "we are looking between here and here in terms of sentence". Then you go down and take into account the aggravating and mitigating circumstances. Then they do a revision of where they are looking at. So they have already indicated that, so we do not really get involved... You could say that it is clear that the offending is linked to the long standing drug habit, but you would not use that as an aggravating or mitigating factor. As far as I am concerned, you would not because the court has already said "these are the aggravating, these are the mitigating, this is where we are now looking at".

### 7.3.9 Personal mitigation

On the matter of personal mitigation, all officers commented on the effects of remorse shown by the offender. Two officers commented that the offender's demonstration of remorse would not have a noticeable impact on the recommendation made within the report, but a lack of remorse tends to be frowned upon by the court and may lead to more punitive sanctioning:

P5: If they stand there saying they absolutely do not care, then [the court] will be much harsher on them. If you are completely remorseful [and] ashamed, that will hold some weight with the court... Just because they are really remorseful and really understand it, they may still need the same amount of work through the Probation Service that I thought they did anyway [so the recommendation would be the same regardless of remorse]. They might have areas in their life like coming off drugs, looking for work, and those things will be the same whether [or not] they are really sorry.



Other officers maintained that remorse is an important factor for inclusion in the report and that it may affect the recommendation; it can strengthen the proposal for sentencing within the community. Where the offender demonstrates genuine remorse, he may be more susceptible to treatment within the community because he has recognised his wrongdoing, suggesting that he is willing to move away from a life of crime:

P2: If [the offender] is remorseful, then it might save them from custody because it given you something to work with.

### 7.3.10 Previous convictions

Most officers commented that previous convictions are an important feature to consider within the report, although they do not necessarily affect the sentence type prescribed in the recommendation:

P3: [Previous convictions are] taken into consideration but not to the extent that it would completely jump from being high community to custody.

However, previous convictions can shape the report's proposal where the offender shows a history of failing to comply with court orders. Where this is the case, the officer may be discouraged from recommending a similar order:

P1: [Previous convictions are] a good indication of how they are going to comply with sentence. So if someone has got three or four convictions within the same 12 months, and they are quite recent, you can say the likelihood is that they are not going to comply with [a similar order now].

Rather than influencing the author's proposal within the report, previous convictions were noted for their ability to offer an insight into the offender's life at the time, and to illustrate

patterns in offending behaviour. Where an offender does show a pattern of criminality, this may strengthen the report's proposal for a rehabilitative approach to sentencing:

P3: Theft, normally, is a pattern of offending. That strengthens your proposal for a drug rehabilitation requirement then because you have a cycle of offending, the drug addiction, and to try and break that cycle, you need treatment.

Officers also highlighted the importance of looking toward previous convictions to identify an escalation in offending. Moreover, where the offender has downgraded the seriousness of his offending (from, say, robbery to theft), this can act as significant mitigation for the offender by revealing that something is working, although this is not necessarily recognised by the courts:

P4: If [the current offending] is less serious [than previous offending] then I think that is some success on some level, if the offending has gone from wounding to jumping a train. I do not necessarily think that offenders get mitigation enough for less serious offending. It is an obvious sign that something is working but it has not quite got to the stage of having finished working. And I do not think that is taken into consideration by the courts. Having dealings with offenders who fine that quite irritating, I can understand their point of view; they are trying and it is not getting recognised.

### 7.3.11 Previous sentences

On the question of previous sentences, officers felt these were considerably less important than previous convictions. One officer expressly stated that drawing up a proposed sentence is not a 'ratcheting up' exercise:

P2: I do not look at [previous sentences] and think "he had a community order last time, perhaps he needs a suspended sentence this time." It does not really cross my mind.

As with previous convictions, most officers use previous sentences to foretell the offender's likely compliance with a community order, in light of earlier breaches:

P4: I would not say that [previous sentences] make a huge difference unless you have got someone who has had a lot of previous community sentences and has constantly breached their orders, then it would be an issue. If someone has had four community orders before...and they have breached every single one of them...I would not recommend [a similar order] unless specific circumstances have changed for that offender.

Similarly, Officer Three had emphasised the need to consider the offender's current circumstances. The fact that an individual has breached orders in the past does not necessarily require all community orders to be discounted; a change in offender circumstances may suggest a newfound willingness to comply:

P3: Theft offences are normally committed by drug addicts, and often have a history of breaching orders. If they have had a drug rehabilitation requirement before and have not complied, we do look at whether they are motivated enough to comply. To be fair, I like to give people a chance... You have got to think about resources [but] I would never disregard an offender. You look at their current circumstances.

### 7.3.12 Concluding remarks

For the most part, the interviews with probation officers depicted a general consistency between responses, demonstrating coherent practices and application of principles. The interviews led to two manifest primary conclusions, the first being the Probation Service's evident reliance on community sentences in their recommendations. It appears that custody is not expressly recommended within the report; rather the author would conclude that the offender could not be managed within the community, effectively rendering custody as the only available option. The officers demonstrated an attraction toward dealing with the offender in the least severe manner, thereby avoiding custody as much as possible. One officer explicitly claimed that the courts can be dissuaded from imposing short custodial terms by recommending a non-custodial alternative. This would be the case in all magistrates' cases where custody was being considered, and consequently would hold true

in most theft cases. Probation officers had noted that imprisonment would only be recommended where the offender has clearly demonstrated an unwillingness to comply with any community order offered. Consequently, the decision to recommend imprisonment is based squarely on whether or not the offender would be likely to breach an order. In theft cases at least, the seriousness of the offence alone would not lead the reports' author to conclude that custody was necessary.

Below the community sentence band, fines were never proposed in the reports. However a conditional discharge could be recommended where the offender had no specific needs or wellbeing issues and had not amassed a lengthy prior record. Most recommendations would consequently fall within the community sentence band, a fact which is explained in part by the Probation Service's positioning within the criminal justice system. Effectively, the task of the author in writing a report and recommending a sentence is to determine whether the Service can offer a programme within the community.

Community sentences have an added benefit of being tailored to suit the individual offender. The officers hold them in high regard as being useful and more positive sentencing options in trying to help the offender and reduce the incidence of crime. This leads to the second conclusion to be drawn from the interviews: the reports' focus on the offender.

Although a pre-sentence report includes information on both the offence and offender, the officers' responses show an overwhelming concentration on matters relating to the offender. The officers had claimed that the role of the recommendation was to provide the court with the most suitable disposal option *for the offender*. Officers also expressed the clear need to give reasons for discounting any unsuitable options. Failure to alert the court as to which

penalties are not appropriate (along with reasons why) could lead the court to impose it regardless.

Offence specific aggravation and mitigation is not taken into consideration to any noticeable extent as these factors are reflected in the court's prescribed sentence range, which is provided to the probation officer before the offender interview takes place. Any penalty within the range supplied would be appropriate for the offence. The probation officer then decides on the best sentencing option for the offender. It was noted, however, that the officer may depart from the prescribed range if previously unknown issues come to light which require a different response to those being considered by the court within its range.

Personal mitigation, and other matters specific to the offender, make up a considerable portion of the reports, with issues relating to substance misuse, accommodation, education, employment, finances, relationships and general lifestyle all being reviewed. Issues such as victim awareness and substance misuse can provide a focus for the offender to work on under a community order.

Previous convictions and previous sentences were viewed by the officers as important tools in gauging the offender's issues and providing an insight into his life. Previous convictions were not viewed as aggravating and would not, in themselves, result in a more punitive sentence being recommended unless the individual has demonstrated a repeated non-compliance to previous orders. Recommendations could be affected where the offender was known to breach community penalties by concluding that he may remain unlikely to comply still. Consequently a community order may not be proposed. However, some officers indicated that previous breaches may not stand in the way of recommending a community programme if the offender's circumstances have changed and he now shows a

readiness to comply with an order. Once again, in such cases the recommendation for a community order is based on the offender and his attitude rather than the offence.

Officers noted that their role was to assist the court by presenting information gleaned from the interview with the offender, and to make a recommendation for sentence based on what is considered to be the most appropriate option for the offender in light of the available resources. Perhaps it is more accurate to define the role of the recommendation as advising the court whether or not the offender is suitable for punishment within the community, owing to the fact that the report does not expressly recommend custody or propose the payment of a fine, and only on very rare occasions would a conditional discharge be recommended.

#### 7.4 Concluding Remarks

Probation officers had estimated that the majority (80 – 90 percent) of recommendations provided within pre-sentence reports were likely to be followed by the sentencing court, with the Crown Court being less likely than the magistrates' court to implement the recommendation. The proposed sentences for minor acquisitive crime, such as theft, are likely to be followed where the seriousness of the offence does not warrant a custodial sentence; at least some of the 10-20 percent of recommendations not followed by the courts would be likely to warrant custody, perhaps on the basis of offence seriousness, which the report may not have recommended where the offender has demonstrated a willingness to comply with a community-based order.

With the courts' focus drawn to offence seriousness, and the reports concentrating on the offender, the overall sentence imposed is likely to reflect the seriousness of the offence whilst also being the most appropriate disposal option for the offender. This however is subject to two caveats. Firstly, that the sentencing court implements the recommended sentence proposed within the pre-sentence report, and secondly, in determining the recommended sentence, the reports' author does not depart from the confines of the prescribed sentencing range set by the court.

## **CHAPTER EIGHT**

### **MAKING SENSE OF SENTENCING FOR THEFT**

The purpose of this chapter is to try to make sense of the courts' sentencing practice in theft cases, and to identify the apparent justifications and purposes which lay behind the sentences. During the study, there was no opportunity to interview the magistrates and judges responsible for determining the sentence in each case in the sample, which would have provided a more certain explanation of the sentencing decision. Nevertheless, the chapter will try to suggest explanations based on the information available.

The chapter begins by considering those cases in which the sentence appears to have been determined by reference to the seriousness of the offence, and thus where the sentence could be said to represent a proportionate response to the seriousness of the offence. The chapter then identifies a number of cases in which the sentence may initially appear either disproportionately severe or disproportionately lenient, but the offender's previous criminal record and/or circumstances seem to have been influential. At the same time, it may be that some of these seemingly severe or lenient sentences can be (better) understood on the basis of some other justification or purpose (such as rehabilitation, deterrence or incapacitation). Some sentences nevertheless do appear to be disproportionate to the seriousness of the offence. Finally, the chapter explores the apparent sentencing practice relating to young offenders in the sample, for whom proportionality plays a less central role but rather the aim is to prevent further offending.



## 8.1 Adult Offenders

### 8.1.1 Proportionate Sentences

There was some evidence in the sample that the sentencing decision is based on the seriousness of the offence, across a variety of theft offences and the whole range of disposal options. Subsequent interviews with sentencers indicated the importance for courts to impose proportionate sentences, with some magistrates explaining that custodial sentences would be imposed where an offence involves a series of aggravating features and, perhaps, a lack of mitigation. However, in only a minority of custody cases did the decision to imprison appear to have been justified by reference to the seriousness of the theft itself. An example of this is case 292 in which a store manager had appropriated £27,000 by authorising dishonest refunds. The Crown Court ordered that he serve 12 months in prison, no doubt due to the overwhelming presence of aggravating features: the high value of the property, breach of trust, the sophisticated methods used to conceal his actions, and the extended period of the offending.

During interviews with sentencers, theft in breach of trust was the most commonly cited factor likely to attract a custodial sentence, although magistrates indicated that the custody threshold is most likely to be crossed where a breach of trust is present alongside other aggravating features (such as high value of goods stolen),<sup>1</sup> as occurred in case 292 above. Similarly, the analysis in Chapter Five found breach of trust and high value to be significant in determining sentence, seemingly being significant enough to push an offence over the custody threshold.

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<sup>1</sup> See section 7.2.4

In other cases, the court seems to have imposed a period of immediate imprisonment based on the seriousness of an associated (non-theft) offence. In case 220, the offender had head-butted a security guard having been detained following a £30 shoplifting. The court imposed a three month prison term for common assault with one month imposed consecutively for the theft.<sup>2</sup> The three month sentence for the assault was almost certainly a proportionate sentence and one which provided an element of public protection.<sup>3</sup> With a longer sentence imposed for assault than that imposed for the theft, the court viewed the violent conduct as more serious than the associated theft. The sentence may have been determined principally in relation to the assault, with the theft being dealt with as a 'bolt-on' offence. One month imprisonment for theft seems disproportionately severe, but since the court clearly believed that the assault justified a custodial sentence, this restricted the options available in dealing with the theft. The offender's incarceration for assault would prevent the court from imposing a community sentence or a fine;<sup>4</sup> the offender would not be available to undertake work or supervision in the community whilst presently incarcerated. Therefore, unless willing to impose a discharge for the theft, which would have been too lenient, the court had little choice but to pass a custodial sentence.

The custody threshold also applies to suspended sentences of imprisonment. Consequently, a suspended sentence should only be imposed where the offence is so serious that a non-custodial sentence cannot be justified. Of the three cases resulting in a suspended sentence, case 281, which was heard in the Crown Court, was the only case where the offence could be

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<sup>2</sup> Consecutive sentences are rightfully imposed where the offences are of a dissimilar nature and are committed against different victims. See Ashworth (2005), page 46

<sup>3</sup> Section 79(2)(b) of the PCCSA 2000 provided the courts with a power to imprison offenders for violent or sexual conduct from which the public needed protecting.

<sup>4</sup> A fine should not be imposed in conjunction with a custodial sentence where the offender is unable to pay the fine (*Maud* (1980) 2 Cr App (S) R289), or where it would place the offender under a financial burden upon release (*McCormack* Unreported, 16<sup>th</sup> January 1976).

said to have crossed the custody threshold.<sup>5</sup> The offender had stolen jewellery worth £10,000 whilst delivering furniture to the victim's house. He eventually pleaded guilty to the offence, but had taken steps to avoid detection (namely by swallowing the ring before being searched at the police station). The offender had only one previous conviction, which was 'spent'.<sup>6</sup> His previous good character seemed to have induced the court to suspend the period of imprisonment which was otherwise justified by reference to the seriousness of the offence, based on the value of the property stolen and the breach of trust.

Before imposing a community-based sentence, the court must be satisfied that the offence committed is serious enough to warrant such a penalty.<sup>7</sup> Although some community sentences have crime-reduction aims (most notably the community rehabilitation order (CRO) and drug treatment and testing order (DTTO) which are both based primarily on notions of rehabilitation), according to the 1991 Act, these should still only be imposed where justified by the gravity of the offence. A number of cases demonstrate the courts' desire to impose proportionate community sentences. On occasion, the community-sentence threshold may have been crossed by reason of the totality of the offending. Offenders sentenced for multiple counts were significantly more likely to receive a community (or indeed a custodial) sentence than a fine or discharge. Only 9.7 percent of fines and 12.2 percent of discharges were imposed of multiple-count offenders, compared with 50 percent of community orders and 65.9 percent of custodial sentences.

Four offenders convicted of either theft from a vehicle or from a dwelling were placed under a CRO. The aggravating factors present in these cases (related damage to property in the

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<sup>5</sup> The other two cases are discussed below in section 8.1.2 as apparently disproportionate sentences imposed on the basis of the offenders' record.

<sup>6</sup> In accordance with the Rehabilitation of Offenders Act 1974

<sup>7</sup> See sections 6(1) of the Criminal Justice Act 1991, as replicated in section 35(1) of the PCCSA 2000, and subsequently section 148(1) of the Criminal Justice Act 2003.

case of a theft from a vehicle, or an element of breach of trust where the offender stole from a dwelling) rendered the offences sufficiently serious to justify a community sentence. However, quite rightly they were not viewed by the court as sufficiently serious to cross the custody threshold or to warrant the imposition of a more punitive community order. For example, the offender in case 225 had stolen an alloy wheel valued £240 from a vehicle. He was arrested three months' later, having been identified by a fingerprint found on the vehicle. He initially denied having committed the offence, but eventually entered a guilty plea. He had ten previous convictions, only one of which was for theft, and was ordered to undertake an 18-month CRO. It seems that the penalty was chosen to reflect the seriousness of the offence rather than the offender's prior convictions, most of which were of a dissimilar nature. Had the offender's previous history been influential, the sentence would probably have been a community punishment order (CPO) or community punishment and rehabilitation order CPRO.

The community punishment and rehabilitation order (CPRO) is one of the most punitive community sentences and may be expected to be imposed in some of the more serious thefts, perhaps where the offence lies on the cusp of the custody threshold. In genuine borderline cases, it seems that non-offence characteristics may influence the sentence. But strictly, if the offence crosses the custody threshold, non-offence characteristics should not be used to reduce it to a community sentence. Nevertheless, five offenders in the sample were ordered to undertake a CPRO, including three whose offences were sufficiently serious to justify the imposition of the penalty. For example, in case 230, the offender had siphoned fuel from a car by cutting the fuel line, thereby causing damage to the vehicle, and had attempted a similar offence against a second car. The offender had 14 previous convictions, including five thefts, and was ordered to undertake a 50-hour, one-year CPRO. This

sentence seems justifiable on the basis of offence seriousness, rather than the offender's relatively short prior history.

At first glance, two cases resulting in the imposition of a CPRO do not appear to be sufficiently serious to cross the community-sentence threshold. For example, the offender in case 280 was made the subject of a two year CPRO following a typical shoplifting involving confectionary valued £20. The offender had 14 previous convictions, including six thefts. The offender had been made the subject of a similar order five months earlier, which had been imposed by the Crown Court. By imposing a CPRO in this case, the Court effectively extended the previously imposed order. Although the offender was not formally charged for breach of the earlier CPRO, the latest offence effectively meant that he was *de facto* in breach of it. The court may have been influenced by this in deciding to impose a CPRO for the latest offence. If so, it is arguable that although in one sense the CPRO was a response to the offender's previous record, in another sense, the breach of the earlier CPRO is a characteristic of the latest theft so that the CPRO is not a disproportionate sentence.

Community sentences may also have been justified by reference to the seriousness of the offending on totality. Five offenders who were made the subject of a DTTO accounted for 21 offences. For example, one offender was sentenced for six typical shopliftings of a total value of £390. He had seven previous convictions, only one of which was for theft. Individually, the offences would almost certainly not have been sufficiently serious to justify the imposition of a DTTO, but when considered together, the court seems to have concluded that the community-sentence threshold had been crossed. The sentence satisfies proportionality whilst also presenting an opportunity for rehabilitation.

Fines were imposed in 31 cases committed by 30 offenders. The fine was most commonly imposed for low-value and typical shopliftings (22 cases) in which the low-value of the property, early admission of guilt and general lack of aggravating features no doubt led the court to conclude that a fine represented a proportionate response to the crime. Fines were also imposed in other (not retail) low value thefts, including case 158 in which the offender was ordered to tow away a vehicle impounded by the police. Whilst doing so, he removed a pair of driving gloves valued £6 from the vehicle. The offender was of previous good character, having no previous convictions, and was ordered to pay a £100 fine. Given the particularly low value of the property, a more punitive sentence (such as a community order) would almost certainly have been a disproportionately severe response to the offending. Furthermore, the fact that the offender was employed may have led the court to perceive him as able to pay a fine. His previous good character meant that he had not accumulated a pattern of offending for which he would require rehabilitation. Overall, a fine seems to be a proportionate response to the offence.

Fines might still have been imposed for non-serious offences even where the offender had a lengthy criminal history, implying that prior record in itself would not necessarily lead to the imposition of a penalty disproportionate to the seriousness of the offence. This practice would comply with the 1991 Act which required the sentencing decision to be based on the seriousness of the offence and not in reference to the offender's prior history. As an example, the offender in case 123 had 109 previous convictions including 65 for theft, and was fined £50 for a typical shoplifting involving the theft of property valued £20. Unlike other cases discussed elsewhere in this chapter,<sup>8</sup> the sentence seems to have been based solely on the seriousness of the offence.

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<sup>8</sup> See sections 8.1.2 – 8.1.5 below

In a further group of cases, proportionality appears to dominate rehabilitative concerns. Firstly, it appears that the court will not be dissuaded from imposing a custodial sentence where the offence, which crosses the custody threshold, is committed due to the offender's drug addiction, despite the fact that a drug treatment and testing order (DTTO) could enable rehabilitation. In case 140, the offender had stolen clothing valued £700 from a shop. The court imposed a four-month term of imprisonment. Arguably, the high value of the property was enough in itself to justify a custodial sentence. There did not appear to be any suggestion that the offender would not comply with a DTTO if imposed (although a pre-sentence report may have highlighted something to the contrary), thereby suggesting that the sentencing decision was based more on the seriousness of the offending than on rehabilitating the offender.

Similarly, case 134 suggests that where an offender commits a particularly trivial offence due to his drug addiction, the court will not necessarily impose a DTTO if the offence is insufficiently serious to cross the community-sentence threshold. The offender had stolen goods valued £2.50 from a shop, and was detained at the scene whereupon he admitted the offence. Although the offender had a known drug addiction and had 22 previous convictions for similar offending, the court imposed a £25 fine, no doubt a reflection of the seriousness of the offence.

Likewise, in case 161, a conditional discharge was imposed on the offender who had committed a typical shoplifting, known to have been motivated by his drug addiction. He had 76 previous convictions, including 25 thefts, and was conditionally discharged for 12 months. The offender had not been made the subject of a DTTO in the past. It is not understood why the court decided not to address the underlying cause of the offending through a rehabilitative disposal option. But, given the non-serious nature of the offence, the

sentence is not disproportionate. In accordance with the legislation, the court was right to ignore the offender's long prior record.

### 8.1.2 The Apparent Influence of the Offender's Criminal Record

The offender's prior record was given only a limited role in the sentencing decision under the 1991 Act by the adoption of the principle of progressive loss of mitigation.<sup>9</sup> However, according to interviews with magistrates, judges and probation officers, prior record can be a significant consideration at the sentencing stage, having the effect of moving the sentence across thresholds. The analysis of the sample of cases supported this claim. To understand the significance of record, it is helpful to consider four different situations. Firstly, where the offender has no prior record, secondly where the offender *does* have a prior record, thirdly where the offender has a recent break in offending, and finally where there is a reduction in the seriousness of the offending.

#### 8.1.2.1 No Previous Record

Where an offence is on the cusp of the custody threshold, a clean record can keep the sentence below custody.<sup>10</sup> For example, the offender in cases 114 and 115 had appropriated £1,800 from a company bank account and proceeded to close the account in an attempt to conceal his actions. The court imposed a 150-hour CPO. The offence, involving high value, breach of trust and sophisticated means, undoubtedly crossed the community-sentence

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<sup>9</sup> See section 2.4.1 above.

<sup>10</sup> M. Hough, J. Jacobson & A. Millie (2003), at 36-38. Additionally see Jacobson & Hough (2007) at 31, who concluded that the sentence severity tends to be reduced for an offender who has no prior criminal record.



threshold and may indeed have been on the cusp of the custody threshold. The court may have been discouraged from imposing a custodial sentence (or a more punitive community sentence such as a CPRO) due to the offender's clean prior record.

Having no prior record can influence the court to be apparently lenient. Three first-time offenders had committed some of the more serious offences resulting in a conditional discharge. The offender in case 066 had committed a £170 shoplifting along with a co-offender (case 065, who herself was ordered to undertake a 12 month CRO concurrent to a similar order that she was already subject to); the offender in 179 had stolen goods valued £200 from a shop, although the offence involved no other obvious aggravation; and the offender in 249 had committed a £235 retail theft along with a co-offender (who herself was cautioned for the offence). Ultimately, the decision to discharge each offender appears to have been based on the offenders' clean prior record, rather than the seriousness of the offence which would otherwise have justified a more punitive sentence, perhaps falling on the cusp of the community threshold.

Having noted that community sentences would usually be considered only after the first few convictions,<sup>11</sup> magistrates believed that a fine or discharge would be an adequate response to many first-time offences,<sup>12</sup> which may be sufficient to deter the offender from further crime whilst also conforming with proportionality where the offences are not particularly serious. First-time offenders, having no pattern of offending, may not represent a risk of reoffending that would warrant the imposition of a rehabilitative sentence. A CRO was only imposed on one first-time offender, who was sentenced for four shopliftings committed during a spree (cases 104-107). The offences were individually relatively non-

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<sup>11</sup> See section 8.1.2.2 below

<sup>12</sup> See section 7.2.5.1

serious, involving property with a total value of £80. The court imposed a six-month CRO.<sup>13</sup> The fact that the offender had committed the offences on a spree appears to have been taken as equivalent to a prior record, suggesting to the court a need to rehabilitate whilst the sentence also offered a proportionate response to the offence.

During interviews, magistrates had cited conditional discharges as useful disposal options when dealing with first-time offenders for non-serious offences. It was claimed that discharges are cheap and less burdensome than a community sentence, but may nonetheless provide a sufficient deterrence against further offending by the individual. The element of deterrence in these conditional discharge cases is more in the nature of giving the person of generally good character a chance to show that the offence was a lapse, rather than a threat of real punishment. Interviews also pointed to a commonly held view amongst sentencers that a clean prior record is a significant source of mitigation, which may explain the imposition of conditional discharges for first-time offenders.

#### 8.1.2.2 Existence of a Prior Record

Where an offender's prior record demonstrates a pattern of offending, it will often inform the approach taken by the court in sentencing. All judges and magistrates had identified rehabilitation as the primary purpose of sentencing persistent offenders whose criminality is born from a drug or alcohol addiction. Consequently, some offenders with lengthy records for similar offending may be more likely than others to receive seemingly disproportionate but rehabilitative sentences such as CROs and DTTOs, particularly where the offence seriousness seems to be on the borderline between two categories of sentence. Magistrates

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<sup>13</sup> Separate sentences were not given for each offence.

had claimed that community sentences would usually be imposed only once an offender has accumulated a few convictions (except where the offence was particularly serious), giving credence to the claim that the courts may be influenced by other justifications (namely rehabilitative or deterrent) when sentencing persistent offenders.

Section 8.1.1 identified a number of cases resulting in a community sentence, apparently justified on the basis of offence seriousness. Yet elsewhere in the sample, it appears that a community sentence may be imposed due to the offender's criminal history rather than on the basis of the seriousness of the offence. A 12-month CRO was imposed upon the offender in case 065 following her admission to having stolen clothing valued £170 from a shop. The offender had ten previous convictions, including three for theft. Her co-offender had a clean prior record and was conditionally discharged. Since both had played an equal role in the offence, the difference in sentencing cannot be explained by reference to the offence. Rather, it must be due to a difference in the offenders' characters. The value of the goods stolen probably placed the offence on the cusp of the community-sentence threshold. Whilst the co-offender's clean record pulled the sentence down to a discharge, the offender's prior convictions appears to have had the effect of placing the sentence more firmly in the community-sentence bracket.

Although the law requires an offence to be sufficiently serious in order to cross the community sentence threshold, when seeking to impose a proportionate penalty the boundary between a fine and a community sentence may not be particularly crisp or clear. Arguably, a fine can be just as punitive as a community sentence such as a CRO. Case 202 involved a £120 retail theft committed by an offender with 180 previous convictions, including 88 thefts. The court imposed a 12-month CRO, despite the fact that the offender had been placed on probation seven times in the past, also demonstrating that the courts

may continue to try to rehabilitate even the most persistent offenders. Furthermore in case 005, a six-month CRO was imposed upon an offender with 65 previous convictions, 20 of which were for thefts, following a £150 shoplifting. The offender had twice been placed on probation in the past. The PSRs in these cases may have indicated an offender characteristic which suggested that a shorter order could be successful in rehabilitating the offender. In the light of the value of the goods stolen in these cases, the sentences do not seem to have been disproportionate, notwithstanding the offenders' previous convictions.

Similarly to some CROs, the imposition of a CPO may not always have been justified solely by reference to offence seriousness. In case 129 the offender pleaded guilty to a shoplifting involving property valued £120. She had 64 previous convictions, over half of which were for similar thefts, and was ordered to complete an 80-hour CPO. The offender had a history of custodial sentences along with fines and discharges, but community orders had been imposed on her comparatively rarely. The offender had not previously been the subject of a CPO, and the court may have been inclined to impose a CPO in the hope that it would reduce her propensity to reoffend through a deterrent punishment. Although the offence involved the theft of moderately priced goods, the offence was in other ways a typical retail theft: the property was recovered at the scene and the offender immediately admitted the offence; there was little obvious aggravation present. The value of the goods stolen may have led the court to conclude that the community-sentence threshold had just been crossed, although the nature and length of the order may have been informed by the offender's prior criminality.

Case 215 appears to be a clearer illustration of prior record being used to impose a disproportionate sentence. The offender had committed a typical shoplifting involving goods worth £17, for which a proportionate sentence may have been a fine. His prior record

shows a recurring pattern of offending, involving breaches of community orders and receptions into prison as a consequence. Although the immediate offence did not appear to have been sufficiently serious, the court imposed a 12-month and 50-hour CPRO. It is possible that the PSR presented to the court may have demonstrated some hope that supervision and/or work within the community could be effective in reducing the offender's propensity to reoffend which may have enticed the court to combine a sentence aimed to rehabilitate and punish the offender.

It also seems that prior record can pull an offence over the custody threshold, thereby resulting in a disproportionate sentence. The sample included three cases resulting in a suspended sentence; two imposed by the magistrates' court and one in the Crown Court.<sup>14</sup> The two magistrates' cases were typical shopliftings, which ordinarily would not have crossed the custody threshold on the basis of seriousness owing to a lack of aggravating features. In case 051, the offender had stolen property valued £100 from a shop. She was detained at the scene, the property was recovered and an admission of guilt was made. The court suspended a 28-day period of imprisonment for six months. The offender had been made the subject of a CRO one year earlier, which was breached six months later following reconviction for shoplifting. As a result, the court revoked the CRO and resentenced her to a period of imprisonment. Since then, the offender had been imprisoned on a further occasion, again for shoplifting. The decision to impose a suspended sentence seems to have been based on both the offender's prior history and offence seriousness. Whilst the court may not have believed that the gravity of the offence justified imposing a term of immediate imprisonment, the offender's previous sentences had demonstrated an unwillingness to comply with community orders. This may have discouraged the court from imposing further community sentences even though such a penalty may have been a *prima facie*

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<sup>14</sup> The Crown Court case resulting in a suspended sentence is discussed above in section 8.1.1

proportionate response to the offence. If this was indeed the case, it would be evidence of the courts imposing suspended sentences even where the custody threshold is not crossed, perhaps viewing them instead as a non-custodial sentencing option which can thereby be imposed for cases only crossing the community-sentence threshold but falling short of the custody threshold.<sup>15</sup>

Similarly, case 073 involved a typical shoplifting of goods valued £100 which resulted in the imposition of a suspended sentence. It is unlikely that the offence justified the imposition of a custodial sentence based on offence seriousness, and that a factor relating to the offender's character or circumstances may be attributable to the sentencing decision. It was not possible to see the offender's criminal history record, but it may be that this played a role in determining the sentence. The fact that the offences do not seem to have been sufficiently serious to cross the custody threshold may mean that the court again regarded a suspended sentence as akin to a community sentence. The suspended sentence does not fit well in a proportionality-based framework. On the one hand, it is to be regarded as a custodial penalty, carrying the threat of imprisonment upon reconviction. But in reality it is a non-punitive sentence; the main punishment comes where the offender reoffends during the operational period, leading to activation of the sentence. In this regard, the suspended sentence is akin to a conditional discharge and therefore may not be disproportionately severe when imposed for offences which do not cross the custody threshold.

When sentencing offenders with drug addictions, the courts will often seek to rehabilitate the offender through the imposition of a DTTO, providing that the offence does not cross the custody threshold or is so trivial that a community sentence would be overtly

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<sup>15</sup> These concerns that suspended sentences could be imposed for cases only warranting a community sentence were raised in Bottoms (1981), at 15.

disproportionate.<sup>16</sup> The sample included 35 cases (committed by 18 offenders) resulting in a DTTO; all involving thefts from shops. Twenty-four cases (committed by 14 offenders) involved typical shopliftings where the value of the property stolen was below £100. As relatively non-serious offences, the decision to impose a community sentence may not have been justified on the basis of offence seriousness.<sup>17</sup> It was common for offenders subjected to a DTTO to have numerous similar previous convictions, demonstrating a pattern of offending due to their addictions, which may have influenced the court to impose a DTTO in the hope of rehabilitating the offender. For example, the offender in case 112 had committed a typical retail theft involving property valued £23. The gravity of the theft would point to no more than a fine on the basis of proportionate sentencing. He had 77 previous convictions, including 35 for theft. The court imposed a 12 month DTTO. The interviews showed a view unanimously held by all sentencers that the courts should aim to rehabilitate those who persistently offend due to a drug or alcohol dependency,<sup>18</sup> although the court should pay regard to whether the offender's addiction is susceptible to treatment in accordance with section 52(3) of the PCCSA 2000.

Although it is rare to find cases where the courts appear to undertake a 'ratcheting' approach to sentencing (that is, a more punitive penalty is imposed on an offender for each subsequent conviction), such a practice does appear to have occurred in case 103. The offender had stolen clothing valued £50 from a shop. Upon being detained on the premises, he eventually admitted the offence and the property was recovered. He had five previous convictions, four of which were for shopliftings, resulting chronologically in a fine, conditional discharge, community rehabilitation order and three months' imprisonment. For

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<sup>16</sup> See section 8.1.1 above.

<sup>17</sup> Where the offence was trivial, the court may have been dissuaded from imposing a DTTO, even where the offence was a consequence of the offender's drug addiction. In case 134, the offender had committed theft from a shop, having stolen goods valued £2.50. The court ordered the offender to pay a £25 fine rather than imposing a DTTO. The offence may have been too trivial to justify the imposition of a community sentence.

<sup>18</sup> See section 7.2.1

the current offence, the court ordered the offender to serve four months' in prison, which appears to be disproportionately severe. With all prior convictions being dated in the previous 12 months, the offender was relatively new to crime. It is possible that the court had been seeking to deter the offender from continuing his criminal behaviour by imposing progressively more punitive sentences.

Whilst it appears that prior record may affect the type of sentence imposed, it can also have the effect of increasing the duration of a community-sentence beyond what a strictly proportionate approach would necessitate. CROs contained in the sample ranged from six to 24-months in duration, although the length of the order did not appear to necessarily reflect the gravity of the offence. Twelve cases resulted in the imposition of 18-month or 24-month orders, which included some of the more serious offences.<sup>19</sup> However, long orders were also imposed for typical shopliftings committed by offenders with substantial criminal records, again indicating that gravity is informed by both offence and offender factors. Case 169 involved the typical shoplifting of goods worth £70. The offender had 110 previous convictions, 66 of which were for similar offences, and was made the subject of a 24-month CRO. Similarly, an 18-month order was imposed in case 137 following a £75 typical shoplifting committed by an offender with 106 previous convictions including 33 thefts. Where an offender has a sustained pattern of offending, the court may believe that only a lengthy order would provide adequate opportunity to successfully rehabilitate the offender and reduce her propensity to reoffend. But from a purely proportionality perspective the CROs in these cases should probably have been no more than half the durations that were imposed.

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<sup>19</sup> For example, cases 024 and 025 concerned an offender who had removed CCTV cameras worth £750 from two business premises. The offences were clearly planned and the offender had gone to the scene equipped to commit the thefts.



Further evidence of prior history informing the duration of an order can be found in cases 027, 028 and 029. Three offenders had climbed a fence and stole scrap metal from a merchant's yard at 2.00am. Each offender was made the subject of a four-month night curfew, except for the offender in case 029 whose curfew was ordered to run for five months, perhaps due to his lengthy criminal record: whereas the offenders in cases 027 and 028 had six and seven previous theft convictions respectively, the offender in 029 had 39 previous convictions for similar offences. No doubt the fact that the offence occurred in the early morning influenced the court to impose curfews, which would restrict the liberty of the offenders and incapacitate them from committing further offences at similar times of the day, whilst the offences were serious enough to cross the community sentence threshold. Although the offence seems to have been sufficiently serious to cross the community-sentence threshold, if a four-month curfew was proportionate to the gravity of the offence, the court should not have imposed a longer order on the offender in case 029 on the basis of his prior record. Conversely, if the court believed that a five-month curfew was a proportionate response to the offence, the offenders in cases 027 and 028 should not have received a discounted sentence for previous good character; their previous histories were substantial enough for any mitigation afforded for previous good character to have been exhausted under the principle of progressive loss of mitigation.

#### 8.1.2.3 Recent Break in Offending

It seems that a break in offending can ease the severity of the sentence. Conditional discharges were commonplace in the sample, being imposed in 39 cases involving 37 offenders. 33 of these cases were 'typical' (and often very low valued) shopliftings, although conditional discharges were also imposed in two more serious shopliftings involving goods

valued £200 and £235 (cases 176 and 249 respectively). Whether the cases were typical or more aggravated forms of the offence, it was very common for the offender to have had a substantial break in offending prior to the commission of the current offence. In 16 of the 39 cases, the offender had a break in offending of between one and eight years. A further four cases involved offenders with one or no previous convictions. In either set of circumstances, although the offence factors suggest a fine would be more proportionate, the court may have been led to conclude that the offender posed a low-level risk of reoffending, who did not require a rehabilitative or punitively-deterrent sentence, and for whose offence a discharge was sufficient.

#### 8.1.2.4 Reduction in the Seriousness of Offending

Similarly, where the latest offence reveals a reduction in the seriousness of an offender's offending, the court may opt for a lower sentence category. In case 052, the offender had stolen goods valued £100 from a shop, property which was not recovered. The offender had recently been released from custody following his imprisonment for an unrelated burglary. The value of the property together with the fact that it was unrecovered, may have justified a community sentence. There was nothing in the file to explain why the court felt a discharge was adequate, although interviews with probation officers indicated a view that offenders should receive mitigation where their current offence is less serious than offences in their record.

### 8.1.3 Offender Circumstances

In section 8.1.2.2 it was suggested that the courts sometimes impose a community sentence such as a DTTO when sentencing drug addicts even though that seems disproportionate to their offence; the courts' rationale for this is presumably the desire to rehabilitate the offender. There were also cases in the sample where the court effectively allowed such an order, which had been imposed on a previous court appearance, to continue and did this by conditionally discharging the offender for the latest theft. Again this effectively gives rehabilitation priority over proportionality possibly, though not necessarily, to the point of ignoring proportionality entirely. In six cases, a conditional discharge was imposed on an offender who was subject to another order (either a CRO or a DTTO) which was ordered to continue to run and could be justified on rehabilitative grounds. Each of these earlier orders had only recently been imposed and had not been running for long enough to be effective in reducing the offenders' propensity to reoffend. The courts had conditionally discharged the offender for the latest theft and ordered the earlier sentence to continue seemingly so as to give it a chance to be effective. As an example, the offender in case 026 had committed a typical shoplifting involving goods valued £38, for which a fine would probably have been proportionate. The previously imposed DTTO was left to run, and the court conditionally discharged the offender for the latest offence. A further two cases concerned offenders with drug addictions who had demonstrated remorse for their offending and had voluntarily sought drug treatment, with which the court may not have wished to interfere by imposing anything more burdensome than a discharge. For example, the court conditionally discharged the offender in case 149 following his guilty plea for a £40 typical shoplifting. The offender had 23 similar previous convictions and had voluntarily sought drug treatment. Whereas in other cases, previous convictions may lead the court to impose a *prima facie* disproportionately punitive order, here the offender was discharged so that his

drug addiction could be addressed. In that regard, the sentence was both rehabilitative and not obviously disproportionate.

Other aspects of an offender's circumstances can apparently also persuade the court to impose a fine when a community sentence would probably have been more proportionate. The court's purpose in doing this seems to be crime prevention. The sample included two cases resulting in a fine for which a community sentence was probably justifiable. The court's decision may have been informed by the offender's previous good character, which seems to have pulled the offence below the community-sentence threshold. For example, case 210 involved an employee of a warehouse who attempted to leave the work premises prior to the end of his shift. He was found to be carrying electronics valued £250 and was fined £100. The value along with the breach of trust would probably have justified the imposition of a community sentence. *Prima facie*, the sentence seems disproportionately lenient. A possible explanation for this is that the court was keen for the offender to take advantage of being in employment in the hope that this would bring stability to his life and thus prevent him from reoffending.

At times, the court seems to have no choice but to impose a disproportionately lenient sentence. Two cases in the sample resulted in the imposition of an absolute discharge, both of which seem to be disproportionately lenient.<sup>20</sup> In case 037, the offender was convicted of theft from a vehicle, involving significant damage and £170 loss. No doubt the offence would ordinarily have warranted a more punitive disposal, but at the time of sentencing, the offender was serving five years' imprisonment for an unrelated burglary.<sup>21</sup> The offender's incarceration would have limited the disposal options available to the courts for the current offence. A proportionate sentence for the current offence would probably have been a

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<sup>20</sup> One of these involved a young offender and is discussed at section 8.2.2

<sup>21</sup> This case is dealt with in detail in section 5.14 above.

community sentence, but it was impossible to impose such a sentence because the offender was serving a prison sentence at the time. The court could have imposed either a short consecutive custodial sentence or a discharge for the theft.<sup>22</sup> Further custody would have been disproportionately severe, perhaps explaining why the court opted for a discharge.

Conversely, the offender's circumstances may effectively force the court to impose a disproportionately tough sentence. Cases 038 and 039 involved two offenders who were on prison licence at the time the offences took place. Both resulted in the imposition of 14-day custodial sentences. Both cases involved typical shopliftings which would not ordinarily cross the custody threshold. No doubt the sentences were determined in reference to the prison licence terms (namely that the offender would risk re-imprisonment upon reconviction) rather than on the seriousness of the offences.

#### 8.1.4 Clearly Disproportionate Sentences

Both magistrates and probation officers expressed a desire to rehabilitate an offender who suffers from a drug dependency. However, the magistrates had also said that a DTTO would only be imposed where it appeared there was a chance of it successfully treating an offender's dependency.<sup>23</sup> This is consistent with the legislation which states that a DTTO should only be imposed where an offender's addiction is susceptible to treatment.<sup>24</sup>

But if the offender does not show a willingness to comply with a DTTO, then it seems that the court may impose a custodial sentence which is *prima facie* disproportionately severe to

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<sup>22</sup> A conditional discharge would have been inappropriate as the only condition to be attached (that the offender will not reoffend during the operational period of the discharge) is redundant whilst the offender is incarcerated.

<sup>23</sup> See section 7.2.5.1

<sup>24</sup> As re-enacted in section 52(3) PCCSA 2000

the gravity of the offence. In such cases, a fine may be a proportionate sentence, but the offender's record pulls this beyond the community threshold, and the offender's unwillingness to comply with a community sentence again pulls the sentence up into the custody bracket. In case 021, the offender had refused help from a member of the drug referral team at the police station following his arrest for a typical shoplifting involving goods valued £17. The offender had 35 previous convictions, around half of which were for theft, and was imprisoned for two months. It does not appear that the gravity of the offence had justified the imposition of a custodial sentence. Rather, the decision to imprison had been based on the offender's unwillingness to comply with a DTTO. Given the offender's prior record, no doubt the court was willing to impose a community sentence aimed at rehabilitating him. The courts may take the view that where an offender is unwilling to comply with one order, this is indicative of a wider unwillingness to comply with *any* order.<sup>25</sup> Since he was unwilling to accept treatment, the court may have sought to incapacitate him whilst he posed a high risk of reoffending. During interviews, magistrates had indicated that a failure by the offender to comply with previous community sentences may by necessity lead to the imposition of a custodial sentence.

Similarly, the offender in cases 094 and 095 was sentenced to serve seven-day concurrent prison terms for two low-value shopliftings (£11 and £6 respectively). The decision to imprison was unlikely to have been made on the basis of offence seriousness – a fine would have been a more proportionate response - but the court seems to have been influenced by the offender's prolific recent offending record, which included nine convictions (five shopliftings) in the preceding twelve months. That being said, the offender had not been made the subject of a community sentence since 1994 (which was not breached). In the

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<sup>25</sup> C.f. the views expressed by probation officers, who suggested that they would not disregard an offender who is unwilling to comply with one order.

circumstances therefore, it seems odd that the court did not consider a community order in an attempt to halt the offender's criminality.<sup>26</sup>

#### 8.1.5 Apparently Perverse Sentences

In some cases resulting in a custodial sentence, the decision appears to have been based on the seriousness of the offence, whilst the offender's record or circumstances appears to have been heavily influential in other cases. In a third group of cases resulting in custody, the reasoning behind the decision to imprison cannot be determined on the basis of the gravity of the offence or the offender's prior record. In cases 121 and 122, two co-offenders had stolen goods valued at £40 from a shop. Once detained, they both fully admitted the offence and entered early guilty pleas. Other than the fact that the offence was committed by a group (a pair), there was little apparent aggravation and the offence was in other ways typical. The offender in 122, a 31-year-old male with 38 previous convictions including nine thefts, was placed under a four-month curfew. The 23-year-old co-offender (case 121) on the other hand, who had 19 previous convictions including 12 for theft, was sentenced to serve one month imprisonment. There was no suggestion in the CPS case file that the offender in 121 was in some way more culpable, or had played a different role than his co-offender, which would explain the decision to impose a custodial sentence upon only one of the offenders. In the absence of information to the contrary, it was assumed that each party played an equal role in the commission of the crime: were this not the case, the particulars of the offence contained in the prosecution file would have been expected to more accurately reflect the actual roles played by each of the parties. The different sentences imposed upon each co-offender could not therefore be explained by reference to offence seriousness. This was a low

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<sup>26</sup> One might speculate that there was information available to the court, perhaps in a PSR, indicating that the offender was unwilling to cooperate with a community sentence or was otherwise unsuitable.

value theft, albeit aggravated by the fact that it was committed by two offenders, and a proportionate sentence would be a community penalty at most. Imprisonment in case 121 therefore seems disproportionately severe. Further, the difference in sentence cannot be explained by reference to prior convictions as both offenders had lengthy records.

An example of an overtly disproportionately lenient fine can be found in case 213. The offender stole a handbag and its contents valued £30 from a parked vehicle, breaking a window in the process. Upon being later detained, he denied the offence and proceeded to plead not guilty. He had 58 previous convictions dating back to 1974, including 12 for theft. Although the offender had a long criminal history, he had only one court appearance in the previous year. The seriousness of the offence, along with the not guilty plea, probably would have been sufficient to justify the imposition of community sentence (e.g. a CPO) but the sentence was a mere £75 fine. One can only speculate why the court determined a fine as an adequate punishment. The offender had not previously been ordered to undertake a CPO, which may suggest that he was assessed as unsuitable for work in the community. The spasmodic pattern of his offending may have led the court to believe that it was not necessary to attempt to rehabilitate him.

## 8.2 Young Offenders

Proportionality plays a less central role in the sentencing of young offenders, particularly first-time young offenders who must be referred to a youth offending panel following a guilty plea, unless the gravity of the offence warrants either a custodial sentence or



discharge, suggesting a *degree* of proportionality.<sup>27</sup> Between these two extremes, all offences committed by first-time young offenders who plead guilty must be dealt with by way of a referral order, even for offences whose seriousness falls just short of the custody threshold and those on the cusp of a discharge. The effect of this is that the referral order may be imposed against a wide range of offences of varying degrees of seriousness.

Other than in relation to first-time young offenders, the sentencing hierarchy in youth justice is broadly analogous to that for adult offenders. Custodial and community sentences may only be imposed where the seriousness of the offence crosses the appropriate threshold; the same thresholds as are applicable to adult offenders.

### 8.2.1 Upholding the Welfare of the Young Offender

For all young offenders, whether first-time or persistent, the principal aim of the youth justice system is to “prevent offending by children and young persons”<sup>28</sup> whilst also “having regard to the welfare of the child”.<sup>29</sup> This latter requirement may mean that the courts are less likely to impose a custodial sentence upon a young offender, preferring instead to impose a rehabilitative and supportive disposal option, which at the same time does not risk exposing the child to the potentially damaging effects of imprisonment. In interviews, those sentencers who had experience of dealing with young offenders indicated that crime reduction is paramount. Rehabilitation and support will usually be offered, but when dealing with very persistent young offenders, the courts’ attention seems to shift to a deterrence and public-protection model. There was considerably less suggestion made that

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<sup>27</sup> Section 16 PCCSA 2000

<sup>28</sup> Section 37 Crime and Disorder Act 1998

<sup>29</sup> Section 44 Children and Young Persons Act 1933

the courts will pay high regard to the seriousness of the offence, and therefore may not be primarily concerned with upholding proportionality.

As outlined above, the referral order is the mandatory disposal for young offenders who plead guilty at their first prosecution, provided that the court does not propose to impose either custody or an absolute discharge based on the seriousness of the offence. Provided they are completed, referral orders do not count as a conviction, so the young offender may avoid a criminal record along with its corresponding potential alienation and stigma. Its purpose is to support and rehabilitate so as to promote and encourage a crime-free life. Referral orders were imposed in 20 cases in the sample, 11 of which were committed by first time young offenders. Indeed, all first-time young offenders in the sample were referred to the youth offending panel, implying that none of the thefts committed by first-time young offenders were sufficiently serious to warrant imprisonment, but neither would an absolute discharge be appropriate. Offences committed by first-time young offenders tended to be low-value thefts from shops, but the theft of a vehicle valued £600 in case 093, and letters containing a credit card and PIN belonging to the offender's mother which were used to withdraw £750 from the victim's account in case 170 also resulted in referral. The relatively high value in these two cases did not dissuade the court from imposing a referral order. During interview, the judges and experienced magistrates said that the courts will try to avoid imprisoning young offenders so far as this is possible, suggesting that the custody threshold is set higher for young offenders. At first sight, the imposition of a referral order in these two cases may seem a disproportionately lenient response to the offending, but a detention and training order would have been the only alternative penalty available to the court as the offenders had no prior criminal record. The offences were almost certainly sufficiently serious to justify a custodial sentence but, mindful of the need for rehabilitation and support whilst safeguarding the welfare of the child, the courts may have wanted to

spare these young offenders from serving a custodial term and the alienation and social and educational impact such an experience may have upon them.

The desire to give priority to welfare may be so strong that the courts may be led to refer young offenders even where they should not do so.<sup>30</sup> The courts imposed nine referral orders on young offenders with one previous conviction, despite the fact that no such power existed at the time.<sup>31</sup> In four of these cases, the offenders were subject to active referral orders which were effectively extended by the imposition of further referral orders for the current offences, although (again) at the time of sentencing there was no legislative power to legitimise this practice. For example, the offender in cases 187 and 188 had committed two typical retail thefts valued £24 and £34 respectively. The referral order imposed for her only previous conviction was extended by eight months. In a further three cases, the offender had completed the earlier referral order and the offences seemed to cross the community-sentence threshold. As an example, the offender in case 222 had stolen goods valued £240 from a shop. Owing to the relative seriousness of these offences, one would have expected them to result in supervision orders, but the imposition of this would have necessitated the revocation of the existing referral orders which might have been undesirable if the offender was progressing well under the order. The fourth case, in which the offender had stolen £20 dropped on the street by the victim, does not appear to cross the community-sentence threshold, and ought to have resulted in a reparation order, fine or discharge. The obvious implication from these four cases is that the courts were exclusively concerned with rehabilitation and support.

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<sup>30</sup> Although it cannot be said with certainty that the courts were aware that in doing so they were acting *ultra vires*.

<sup>31</sup> When brought into force in April 2009, section 35 of the Criminal Justice and Immigration Act 2008 enhanced the courts' powers to refer a young offender in cases where the offender has been dealt with by a court on one previous occasion, and in exceptional circumstances even where the previous conviction(s) was dealt with by way of a referral order.

### 8.2.2 Purely Rehabilitative Sentences

There was evidence of cases in the sample where the sentence was motivated by rehabilitation with little regard to proportionality. The supervision order was the most commonly imposed penalty for young offenders with one or more previous convictions. Of the 15 cases resulting in supervision (committed by 14 offenders), 12 involved offenders with two or more previous convictions. 11 of these were typical shopliftings or otherwise low-value thefts,<sup>32</sup> and from a proportionality perspective, the offence perhaps did not warrant a community sentence.<sup>33</sup> The decision to impose a supervision order in these cases appears to be based not on the seriousness of the offences, but rather on the offenders' record and the unavailability of the referral order as a disposal option. Where the young offender has a criminal history, the courts appear more intent on imposing a rehabilitative sentence, thereby upholding the principal crime-preventive aim of the youth justice system, albeit at the cost of proportionality.

Only one young offender received an absolute discharge following a low-value retail theft. At the time of sentencing, the offender was already subject to a supervision order imposed for an earlier offence. The sentence seems disproportionately lenient, but may have been selected so as not to interfere with the pre-existing supervision order. That being said, a conditional discharge could have been imposed for the same purpose, but by upholding the existing supervision order, the court's emphasis was on rehabilitation rather than deterrence which is usually associated with a conditional discharge.

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<sup>32</sup> For example, case 224 involving a 12-year-old offender who stole goods valued £10 from a shop. He was made the subject of a supervision order of an unknown duration.

<sup>33</sup> The remaining case (009) involved the theft of goods valued £310 from a shop. Details of the offender's previous convictions were not available, but the offender was described as a persistent young offender. The decision to impose a six month supervision order was most likely based upon the offender's prior record, although it might also have been influenced by the seriousness of the offence.

### 8.2.3 Crime Prevention and Proportionality

There were also some cases where the sentence reflected both a desire to rehabilitate the offender and impose a proportionate sentence. In addition to referral orders, supervision orders were also imposed against young offenders with only one previous conviction. The offender in case 013 had stolen a bankcard belonging to her grandmother and had used it to withdraw £300 from the victim's account. She had one previous conviction (for theft) and was placed under supervision for 18 months. In case 040, the offender had stolen a mobile telephone from his teacher's coat pocket whilst the victim was out of the classroom. Finally, the offender in case 250 had stolen £2.50 from a washing machine in a coin-operated laundrette, causing £600 worth of damage in the process. Although the offender had only one previous conviction, the court imposed a six month supervision order, no doubt a reflection of the gravity of the offence and the significant damage caused. Although the sentences in these three cases were probably selected primarily on the basis of rehabilitation, the supervision orders imposed in each also represented a proportionate response to the seriousness of the offence.

Overall, the practice of discharging young offenders seemed consistent with that applied to adult offenders. The courts are likely to conditionally discharge minor offending where there is a break in offending, or where an offender is subject to a pre-existing order which the court wishes to continue to run. Five persistent young offenders in the sample were discharged for their offences. All offences were non-serious (tending to be low-value, typical shopliftings). Four of the five offenders had a significant break in offending (of between one and three years) preceding the current offence, which seems to reflect the apparent general practice of the courts to discharge offenders who have committed non-serious thefts and

have a noticeable break in their offending.<sup>34</sup> Each of these four offenders was conditionally discharged.

There seems to be evidence of a broad analogy with sentencing adult offenders in that an offender's record may deter the court from giving him the benefit of any doubt about the offence seriousness. In case 228, the offender was fined £25 having stolen property valued £2.50 from a shop. On a purely proportionate basis, the appropriate sentence would probably have been a conditional discharge due to the very low value of the theft. But it seems that the offender's previous convictions persuaded the court to impose a fine. This is not overtly disproportionate, but may well reflect the court's desire to deter the offender.

#### 8.2.4 Purely Proportionate Sentences

It is difficult to judge from cases in the sample whether there were any instances in which the courts sought to sentence a young offender purely on the basis of proportionality. Perhaps the nearest example of this was in cases 089 and 229 which resulted in the imposition of reparation orders. Both involved typical shopliftings and the offenders had one and two previous convictions respectively. The court rightly felt that the offences were not sufficiently serious to justify a community sentence, and that effectively dissuaded the court from imposing a supervision order. There is clearly an element of punishment in the reparation order in the sense that the offender has to face up to the effects of his offence. But there is arguably also an element of crime prevention in that the offender may either be rehabilitated or deterred from further offending by the realisation of what he has done. Furthermore, it is interesting to note that there were other similar cases in the sample

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<sup>34</sup> See section 8.2.2 above

involving typical shopliftings committed by offenders with short criminal records which were dealt with by supervision orders, where more priority seems to be given to rehabilitation than proportionality.

#### 8.2.5 Custodial Sentencing

When imposing a custodial sentence, the same statutory criteria exist in relation to young offenders as that found for adult offenders. In other words, a detention and training order (the youth justice custodial sentence) should be imposed only where the offence is so serious that a non-custodial sentence cannot be justified. But in practice it appears that even in cases which are not especially serious, the presence of a very lengthy record can take the sentence from a community sentence into the custody bracket. Consequently, both proportionality and rehabilitation are abandoned as sentencing aims, and instead the court seeks to deter and incapacitate. Four cases committed by three individuals in the sample resulted in the court imposing a detention and training order. The offender in cases 109 and 110 was convicted of two shopliftings. In the first case, acting as part of a group, he had stolen spirits value £17 from an off-licence. His co-offenders were not caught, and the offender refused to name the other parties. He pleaded not guilty to the offence, admitting that he was at the scene, but denied having any part in the theft. In case 110, the same offender pleaded guilty to a typical shoplifting involving the theft of goods valued £35. The court imposed a four month detention and training order for each count, ordered to run concurrently. Since the first offence had taken place a few months before the second, the offences did not constitute a single transaction, and so should have been dealt with by consecutive sentences. (Ultimately, the same sentence - i.e. four months' imprisonment - could have been reached by imposing two consecutive sentences of two months duration.) The offender had 62

previous convictions, including 12 thefts, and had recently completed an 18-month supervision order, which may have dissuaded the court from imposing a further supervision order on the basis that the earlier order had not reduced his propensity to offend. Although neither of the offences was particularly serious, the court may have been led to take a more punitive approach because of the lack of the offender's cooperation in refusing to name his co-offenders. Additionally, his not guilty plea would deny the offender an important source of mitigation. The offender's prior record and previous sentences may also have influenced the court's decision to impose a custodial sentence. The sentence appears to be disproportionately punitive, but the court may have sought to deter the offender from future criminality. The recent supervision order had not successfully rehabilitated him and that probably dissuaded the court from adopting a rehabilitative approach for the latest offence.

The potential influence of a young offender's record was also seen in case 212 in which the court imposed a six month detention and training order. The offender pleaded guilty to a typical shoplifting involving property worth £48. Again, the decision does not appear to reflect the gravity of the offence. Unlike other typical shopliftings committed by young offenders, the offender in 212 had five court appearances in the current year for offences which resulted in a fine, two separate periods of supervision (both of which were breached), and an attendance centre order. The court seemed to have felt that since the previous sentences had been tried and failed, the offender was beyond any prospect of rehabilitation. This resulted in the court imposing a disproportionately punitive custodial sentence for an otherwise non-serious theft in an effort to deter the offender away from future criminality.



### 8.2.6 Offender Circumstances

It seems that, occasionally at least, the offender's circumstances may influence the sentencing of a young offender. In case 251, the court also imposed a detention and training order on one of two offenders who had stolen £2.50 from a laundrette. It appeared from the CPS file that both offenders were equally culpable. One offender (case 250) was placed under supervision whilst the offender in 251 was ordered to serve a four month detention and training order, to run concurrently to a 12-month order for an unrelated robbery. By imposing a supervision order on one offender, the court had rightly accepted that the offence itself was not sufficiently serious to justify the imposition of a custodial sentence. Rather, the decision to imprison was surely made because of the offender's present incarceration for the earlier robbery and the restrictions this would place on the offender's availability to undertake supervision or a similar order within the community. Had the offender in case 251 not been incarcerated for another offence, the court may have concluded that a supervision order would have been suitable for him also.

The 15-year-old offender in case 071 had one previous conviction (dated two years earlier) and was fined £25 for stealing property valued £35 from a shop, which seemed to be a proportionate sentence. But the sentencing decision may have been influenced more on an offender circumstance (such as their ability to personally pay a fine), rather than being based on the seriousness of the offence. Similar offences elsewhere in the sample (wrongly) resulted in referral orders. Where a young offender is able to pay a fine, this might present an attractive sentencing option to the courts as it is punitive whilst also being of deterrent benefit as the offender himself will be responsible for paying the fine. Fines are also economical as they do not carry the high costs associated with imposing community

sentences. In case 071, it may well be that the offender's ability to personally pay the fine was a factor which confirmed the courts desire to impose a proportionate sentence.

### 8.2.7 An 'Odd' Case

Sometimes the precise details of a sentence were difficult to rationalise. In case 014, the offender had stolen £3 from a desk drawer, where he worked as a part-time cleaner. The offender had one previous conviction for criminal damage. Although there was an element of breach of trust, the theft was very low-value, and yet the court appears to have viewed the offence as quite serious, imposing a 15-hour ACO. Not only did the court seem to believe the offence was sufficiently serious to cross the community-sentence threshold, but it also seems to have regarded the offence as seriousness enough to warrant the imposition of an order of a length exceeding the standard maximum 12-hour order.<sup>35</sup> Arguably, a fine would have been a proportionate sentence, and so it seems that a 15-hour ACO was clearly disproportionate. It is difficult to draw any confident conclusions about this case but it may be that the court had information suggesting that the offender required a real effort to be made in improving his social skills and thereby to prevent further offending.

### 8.3 Concluding Remarks

This chapter has indicated that some sentences are imposed proportionately to the offence in accordance with the 1991 Act's sentencing framework, which construed proportionality by

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<sup>35</sup> According to section 60(4) PCCSA 2000, the length of the order must not exceed 12 hours unless, having regard for all of the circumstances, the court is of the opinion that 12 hours would be inadequate, in which case an order not exceeding 24 hours may be imposed on an offender aged under 16. See further section 2.5.2.9 above.

reference to offence characteristics. This was true across a range of categories of theft and sentences. Furthermore, it seems that the desire for proportionality *can*, in certain circumstances, can take precedence over other sentencing aims (e.g. rehabilitation), such as where a drug addict is fined or imprisoned on the basis of the seriousness of the offence, despite the fact that such offenders may ordinarily be candidates for a rehabilitative approach.

The offender's criminal record can be influential in various ways. Where the offence seriousness puts the sentence on the border between two categories, an absence of previous convictions can persuade the court to opt for the lower category. The court sees such offenders as posing less risk of further offending and may opt for the less punitive sentences which are cheaper and less burdensome on both the state and the offender. Conversely, a criminal record can, in some instances, persuade the court to push the sentence into a higher category. It can certainly deter the court from giving offenders the benefit of any doubt in cases on the border between sentence categories, and may also influence the length or amount of the sentence. Provided the offence is not especially serious or minor, a record can induce the court to emphasise the need for rehabilitation or crime prevention, possibly at the cost of proportionality. Alternatively, where the offender's record shows a break in offending, the courts may be inclined to impose a less punitive sentence, for example by conditionally discharging the offender instead of fining him. Similarly, where the latest offence reveals a reduction in the seriousness of an offender's criminality, the court may show some leniency and opt for a lower sentencing category.

The offender's circumstances can be very influential, with some cases being dealt with disproportionately severely or leniently for the sake of rehabilitation. Elsewhere, circumstances can prevent a proportionate response from being imposed where an offender

is currently serving a sentence which places limitations on the available penalties. Of particular noteworthiness, it seems that occasionally the courts impose quite dramatically disproportionately severe sentences – for example, by imposing a custodial sentence when a fine would have been the appropriate proportionate penalty – through a combination of the offender's record and his unwillingness to comply with court orders.

When sentencing young offenders, there is considerable evidence that, as required by the legislation, the courts are primarily concerned with achieving crime prevention (especially through rehabilitation, but also through deterrence and incapacitation) whilst being mindful of the offender's welfare. Whilst there appeared to be cases where prevention and welfare were compatible with proportionality, there were surely others where there was no such compatibility, and the courts gave preference to prevention and welfare. Moreover, there seemed to be cases where the courts disregarded proportionality, and rehabilitation, on the basis of an offender's record, and imposed a custodial sentence on a young offender. The justification in such cases is believed to be the desire to reduce the offender's incidence of crime. This meant that some cases were dealt with disproportionately severely (for example, supervision orders or detention and training orders for low-value retail thefts) whilst other sentences are disproportionately lenient (for example, referral orders imposed on first-time offenders whose offences are on the cusp of the custody threshold).

Despite the differences between sentencing and sentencing policy with regard to young and adult offenders, there exists some evidence of similarities. In some cases of both groups of offenders, the courts will try to control crime within the confines of proportionality, whereas in other cases the need to control crime can eclipse proportionality as the primary sentencing justification. Some factors were present in both the adult and young offender samples which appear to have the same impact on sentencing. A recent break in offending is likely to be

viewed by the courts as significant mitigation, regardless of whether the offender is an adult or youth. Restrictions on sentence combinations in cases where the offender is currently subject to an order will similarly impact the sentencing decision in the same way despite the age of the offender. There was also evidence that the offender's criminal record can be a significant influence on the sentence, whether he be an adult or young person.

## CHAPTER NINE

### CONCLUSIONS AND IMPLICATIONS

#### 9.1 The Elasticity of Proportionality and its Compatibility with other Sentencing Justifications

The Criminal Justice Act 1991 required sentences to be a proportionate response to the seriousness of the offence. To facilitate this, the courts were required to measure the gravity of the offence by reference to various offence-related aggravating and mitigating factors, and to identify and impose a proportionate sentence on this basis, applying the custodial and community sentence thresholds provided in the Act.

This study has aimed to understand the courts' construction of proportionality in relation to theft. It has also considered the extent to which the courts are willing to adopt sentencing philosophies other than proportionality and has explored the extent to which these are reconcilable with proportionality. The thesis offers three principal related findings regarding its aims.

Firstly, as indicated in Chapter Seven, the courts usually pay high regard to the seriousness of the offence when passing sentence. In measuring offence seriousness, only a small number of factors appear to individually affect the sentence imposed (high value of goods, breach of trust, significant related damage and offending in breach of prison licence

conditions). Elsewhere, other factors may be influential, but less so. Often it is a cocktail of factors which collectively affect the sentence decision, rather than one factor determining the sentence. It seems that the courts give greater regard to the harm element over the offender's culpability in their construction of seriousness perhaps because theft will almost inevitably involve a high degree of culpability, requiring the offender to act both intentionally and dishonestly.

Secondly, in determining sentence severity, there is some evidence to suggest the courts have adopted a system which defies the sentence hierarchy of the 1991 and 2003 Criminal Justice Acts. Rather than basing sentence severity on sentence type alone, the courts have regard to the quantum of that sentence. This is more in line with notions of sentence interchangeability and beliefs that sentences from different bands may be of equivalent severity. The 1991 Act identified custodial and community sentence thresholds, although these may not be conducive to proportionality. The impact of any given sentence will vary depending on the character and circumstances of the offender. For example, a community sentence might have a more punitive effect on an offender than a custodial sentence. The sample included cases where the sentence appeared to have been stretched from one category to another. The courts appeared to do this because they were keen to prevent further offending. Arguably however, these sentences were not necessarily disproportionate.

The quest for perfection in proportionality is elusive: there will rarely (if ever) be a single proportionate sentence for an offence. Deciding whether a sentence is proportionate or not is an art rather than a science, and the measurement of offence seriousness is ultimately subjective, although there are some elements of objectivity. Identifying which factors aggravate or mitigate the seriousness of an offence may be relatively uncontentious. What is more subjective is determining the weight to be ascribed to each factor and, consequently,

how each factor may impact on the sentence. Additionally, the sentence thresholds contained in the 1991 and 2003 Acts are similarly open to subjective interpretation. Whilst some may interpret the threshold tests quite strictly, thereby constructing high thresholds, others may not.

This subjectivity of proportionality extends beyond the courts. The comments made here, particularly in Chapter Eight, are also based on a subjective interpretation of the data, offence seriousness and the thresholds. One cannot therefore always be certain that an apparently severe or lenient sentence was in fact disproportionate. Since it was not possible to interview the sentencers for each case in the sample, one cannot be sure that all sentencers agree in their construction of proportionality. For example, whilst all sentencers may regard a break in offending as a mitigating factor, there may be different views as to how long the break should be, and the extent to which it is mitigating.

The third conclusion to be drawn from the findings relates to the reconciliation of proportionality and crime reduction aims. When sentencing under the 1991 Act, there is evidence of the courts adopting a crime reduction even though there was no statutory obligation to do so. Whilst this can be compatible with proportionality, in other cases it may not be possible to reconcile the two, leading to the courts to adopt either a proportionately non-crime reductive sentence or a disproportionately crime reductive sentence.

There are occasions however when the courts seem to make little or no attempt to pass a proportionate sentence - the most obvious example of this is when sentencing persistent offenders whom the courts seem eager to dissuade from further offending through rehabilitation, deterrence, or simple incapacitation.



One dimension of the subjective nature of proportionality is illustrated in the debate about (i) whether it should be construed purely by reference to offence characteristics or whether it should also have regard to offender characteristics, and also (ii) what constitutes offence characteristics. As to (i) the 1991 Act clearly indicated that proportionality should be confined to offence characteristics, but the sample included cases which appeared to give significance to the offender's criminal record, and that is usually regarded as an offender characteristic. However, one should not be too quick to conclude that the sentence in these cases was disproportionate. First, the elasticity of proportionality may enable a sentence to be stretched from one category to another due to subjectivity in measurement of both offence seriousness and sentence severity. Second, though somewhat tenuously, it is arguable that the offender's record might be construed as an offence characteristic; an offender who has no previous convictions might argue that his theft was an abnormal<sup>1</sup> transgression into criminality for which the law should show some tolerance. The problem with this argument is that it is difficult to apply the same principle to those offenders who have previous convictions. Whilst offenders who have not offended for some time can argue that the break in their offending shows that the latest theft is untypical of their current behaviour, those for whom there is no break in offending clearly cannot rely on this principle.

As to (ii), it is arguable that, for example, where (as occurred in some cases in the sample) an offender who had previously been given a community sentence such as a CRO then commits a theft before the expiration of that order, the fact that the CRO was still in force should be treated as a characteristic of the theft because it is a circumstance in which the theft was committed. Thus the court should take it into account when passing sentence for

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<sup>1</sup> Obviously, this is not to imply any mental or psychiatric abnormality. Rather, the implication is that the theft was not an example of the way in which the offender normally behaves.

the theft as an aggravating factor. Alternatively (and as occurred in the sample) the courts may decide to pass a sentence for the theft which enables the previous order to continue, so that ultimately the offender faces no additional punishment for the (*de facto*) breach. The sentence which is passed for the theft (perhaps a conditional discharge) *prima facie* appears to be disproportionately lenient but the court may be more concerned with preventing reoffending through rehabilitation and continues the CRO for that purpose.

Whilst a lack of previous convictions may be mitigating, Chapter Eight demonstrated that the courts may also regard a lengthy criminal history as aggravating.<sup>2</sup> But record should not aggravate the sentence according to the proportionality principle.<sup>3</sup> It appears, therefore, that the courts are probably not just stretching proportionality but ignoring it by imposing disproportionately tough sentences for some other reason (i.e. crime reduction). As demonstrated in both Chapters Seven and Eight, a pattern of offending may inform the sentencing approach, with the courts paying higher regard of the need to rehabilitate, deter or incapacitate a recidivist. It is possible that the courts view repeat offenders as posing a greater risk of reoffending and accordingly impose more punitive sentences in an effort to reduce this risk.

## 9.2 Young Offenders

For young offenders, the dominant statutory aim is crime prevention whilst upholding the welfare of the child. In some cases, there was evidence of the courts attaching such weight to this that they appear to impose disproportionately lenient (for example, the use of referral

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<sup>2</sup> See section 8.1.2.2

<sup>3</sup> Although Youngjae Lee has recently claimed that a sentence enhancement is justifiable under a desert scheme as a second offence, in addition to being a wrong in itself, also represents a failure of the offender to take steps to prevent himself from committing further crime. This omission accordingly justifies a recidivist premium. See Lee (2010).

orders for offenders with one previous conviction, or first-time offenders whose crimes could justify the imposition of a custodial sentence) or severe (for example, the imposition of supervision orders and detention and training orders for non-serious offences committed by young offenders with lengthy records) sentences. Conversely, it was rare of the courts to uphold proportionality to the exclusion of crime prevention and the offender's welfare. That is not to say that proportionality has no place in youth justice. The mandatory referral order for first-time offenders should only be imposed where the seriousness of the offence does not lead the court to consider imposing a detention and training order or absolute discharge. But it appears the courts impose a particularly high custody threshold in relation to young offenders. It is arguable that in doing so the courts impose disproportionately lenient sentences out of a desire to prevent crime and uphold the welfare of the young offender.

### 9.3 Implications of the Criminal Justice Act 2003

It appears that the 2003 Act did not depart so greatly from the 1991 Act as might have initially seemed. Whilst the 2003 Act makes express reference to the need for courts to have regard to crime reduction justifications, these are clearly compatible with proportionality. The sample contains evidence of crime prevention justifications being used by the courts under the 1991 Act's proportionality-based framework. Whilst the Criminal Justice Act 2003 states that prior record can be a source of aggravation, the sample suggests it could play a similar role under the 1991 Act. Therefore, the 2003 Act may not have made any significant difference to the sentencing of theft.

Although the Act appears *prima facie* to have moved away somewhat from a proportionality-based framework by reference to crime reduction aims and the greater reliance on previous

convictions in determining sentence, other changes brought about under the Act have arguably moved further toward proportionality than before. The previously wide range of community sentences (along with the diversity of their punitiveness) have now been narrowed into three ranges (i.e. low, medium and high-level community sentences), which feature prominently in the SGC's guidelines. The various community sentence requirements have been graduated according to their punitiveness, which may have enabled the courts to more clearly identify those community sentence requirements which would be proportionate to the offence.

With all of this in mind, it appears that comparable cases dealt with under the 2003 Act would not result in the imposition of different sentences to those imposed under the 1991 Act.<sup>4</sup> Fundamentally, the decision to impose a custodial or community-based sentence must still be made on the ground of offence seriousness. Having identified the appropriate sentence band, the court may then move to consider the desirability of seeking to, for example, reform the offender through the imposition of a drug rehabilitation or supervision requirement attached to a community sentence. To safeguard against the imposition of disproportionate sentencing, the menu of purposes provided by the 2003 Act should be a secondary consideration, taken into account only after the court has identified the sentence range as appropriate to the seriousness of the offence.

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<sup>4</sup> Despite the fact that the CJA 2003 appeared to alter significantly the approach taken to previous convictions at sentencing, Wasik (2010) claims that the impression from everyday practice is that the 2003 Act has had very little impact on sentencing practice; at page 164-5.

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